

12-2479-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSHUA MARSHALL,

Plaintiff-Appellee,

-against-

P.O. SALIM RANDALL, Shield No. 15331, Individually and in His
Official Capacity, P.O. MICHAEL BURBRIDGE, Shield No. 15488,
Individually and in His Official Capacity,

Defendants-Appellants,

-and-

THE CITY OF NEW YORK, JOHN DOE, P.O.'s # 1-10 Individually and
in Their Official Capacities (the name John Doe being fictitious, as the true
names are presently unknown),

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume IV of V (pp. A903-1203)

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[REVISED] VERDICT SHEET

1A. Has plaintiff proven by a preponderance of the evidence that Officer Randall falsely arrested the plaintiff on May 15, 2008?

Yes _____

No _____

1B. Has plaintiff proven by a preponderance of the evidence that Officer Burbridge falsely arrested the plaintiff on May 15, 2008?

Yes _____

No _____

2A. Has plaintiff proven by a preponderance of the evidence that Officer Randall maliciously prosecuted the plaintiff?

Yes _____

No _____

2B. Has plaintiff proven by a preponderance of the evidence that Officer Burbridge maliciously prosecuted the plaintiff?

Yes _____

No _____

3A. Has plaintiff proven by a preponderance of the evidence that Officer Randall violated plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

Yes _____

No _____

3B. Has plaintiff proven by a preponderance of the evidence that Officer Burbridge violated plaintiff's constitutional right to a fair trial by knowingly presenting false evidence to the prosecutor?

Yes _____

No _____

A904

Case 1:10-cv-02714-JBW-MVP Document 66 Filed 04/20/12 Page 11 of 11 PageID #: 1034

If you answered No to Questions 1A to 3B STOP, your deliberations are over. The Foreperson should sign and date the verdict form and inform the marshal that you have completed your deliberations.

If you answered Yes to any of these questions, proceed to Question 4.

4. With respect to any question that you answered Yes, has plaintiff proven by a preponderance of the evidence compensatory damages?

Yes_____

No_____

If you find that plaintiff has proven compensatory damages proceed to Question 5.

5. Of the compensatory damages that plaintiff sustained indicate how much, if any, each defendant is liable for:

Defendant Randall \$_____

Defendant Burbridge \$_____

If you find that plaintiff has not proven compensatory damages, then award him nominal damages in an amount not to exceed \$1.00.

We, the Jury empanelled and sworn in the above-entitled action, upon our oaths, do find the above verdict.

Foreperson

Dated April_____, 2012

A905

DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S
RULING REGARDING DEFENDANTS' MOTION IN LIMINE, DATED APRIL 20, 2012
(pp. A905-A912)

REPRODUCED FOLLOWING

A906

Case: 1:10-cv-02714-JBW-VVP Document 68 Filed 10/20/12 Page 1 of 7 PageID #: 1037

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

JOSHUA MARSHALL,

Plaintiff,

-against-

THE CITY OF NEW YORK, P.O. SALIM
RANDALL, Shield No. 15331, Individually and in
His Official Capacity, P.O. MICHAEL
BURBRIDGE, Shield No. 15488, Individually and in
His Official Capacity, and P.O.s "JOHN DOE" #1-
10, Individually and in their Official Capacities, (the
name John Doe being fictitious, as the true names are
presently unknown),

10 Civ. 2714 (JBW)(VVP)

Defendants.

----- x

**DEFENDANTS' MOTION FOR RECONSIDERATION OF THE
COURT'S RULING REGARDING DEFENDANTS' MOTION *IN*
*LIMINE***

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A907

Case 1:10-cv-02714-JBW-MVP Document 68 Filed 04/20/12 Page 2 of 7 PageID #: 1038

PRELIMINARY STATEMENT

Plaintiff Joshua Marshall (“Marshall”) brings this action against Police Officers Salim Randall and Michael Burbridge (“defendants”), pursuant to 42 U.S.C. § 1983, alleging violations of his federal civil rights pursuant to 42 U.S.C. § 1983. Specifically, plaintiff alleges that he was subjected to an unlawful arrest on May 15, 2008, by officers of the New York City Police Department (“NYPD”).

Trial in this matter is scheduled to commence before the Honorable Jack B. Weinstein, United States District Judge, on April 23, 2012. On April 16, 2012, the Court heard argument on the parties’ respective motions *in limine* and made its rulings.

Now come defendants seeking reconsideration of the Court’s ruling with respect to point (IV) of their earlier *in limine* motion, namely, the Court’s denial of defendants’ motion to be permitted to inquire about plaintiff’s March 15, 2008 arrest. Defendants now respectfully request that the Court permit them to elicit testimony from defendant Officer Burbridge to the effect that he had reviewed the NYPD database¹ before he went out on patrol that evening and recognized plaintiff from his photograph, which was a critical factor in the officers’ decision to approach plaintiff. Defendants also seek reconsideration of the Court’s prohibition on their cross-examination of plaintiff concerning his prior convictions, multiple detentions, and lengthy incarcerations, as such are highly relevant to the damages calculation.

¹ Officer Burbridge would testify at trial that he made it his regular practice upon arriving to work for his scheduled tour to review information contained in an electronic police department database relating to recent arrests (particularly gun arrests) in the precinct he would be covering that particular shift. (As a member of the Anti-Crime Unit, the precinct he would cover for his assigned tour would vary.) At his deposition, he testified that he recognized plaintiff from that database. See Ex. A, Burbridge Depo. at 17-19.

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ARGUMENT

POINT I

**DEFENDANTS SHOULD BE PERMITTED TO
ELICIT TESTIMONY FROM OFFICER
BURBRIDGE REGARDING THE FACT THAT
THE OFFICERS FOCUSED ON, AND
APPROACHED PLAINTIFF IN PART
BECAUSE BURBRIDGE RECOGNIZED HIM
FROM A POLICE DATABASE.**

A. Defendants Should Be Permitted to Elicit Testimony from Officer Burbridge Regarding the Fact that the Officers Focused on, and Approached Plaintiff in Part Because Burbridge Recognized Him from a Police Database.

Defendants should be permitted to elicit testimony from Officer Burbridge regarding his recognition of plaintiff from the police database, as it forms a partial basis for the officers' focusing on, and approaching plaintiff. The fact that Officer Burbridge recognized plaintiff as having been previously involved in a gun arrest is crucial to understanding both the officers' state of mind that night when they observed plaintiff. Here, the officers focused on and approached plaintiff because he was in a high crime area late at night, made furtive gestures to a companion—and in no small measure because Officer Burbridge recognized him from having seen his photo in a police department database. The fact that Officer Burbridge recognized plaintiff is part of the *res gestae* leading up to the events at issue, as well as the total mix of factors leading them to approach plaintiff.

For example, at his deposition, Officer Burbridge testified that he approached plaintiff in part because he recognized him from the database:

Q: Why were you planning on stopping Joshua Marshall?

A: Because they were walking on Broadway. And when I got to the corner, I observed the individual. *I notified any [my] partners that I knew he had been arrested for a firearm.* At that point, he made the right down Park and signaled to his buddy, who kept walking straight on Broadway, like he was going past Park, to come with him, this way, this way.

A909

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Ex. A, Burbridge Depo. At 21, ll. 4-14 (emphasis added).

Similarly, Officer Randall testified that:

Q: When you first observed Mr. Marshall did you say anything to your fellow officers?

A: No.

Q: Did your fellow officers say anything to you?

A: Yes.

Q: What did they say to you?

A: *Officer Burbridge informed me that he recognized Mr. Marshall as being arrested for a gun before and told me he wanted to talk to him.*

Q: Did he tell you when Mr. Marshall had been arrested for a gun before?

A: No.

Q: Did he tell you any details about the prior gun arrest?

A: No.

Q: Did you ask any questions?

A: No.

Ex. A, Depo. of Randall, at 26, ll. 10-25; p. 27, ll. 2-6 (emphasis added).

Without such testimony, defendants will be prejudiced from fully explaining their version of events, and will instead be left with telling the jury a truncated version of what transpired prior to their encounter with plaintiff. This prejudice will infect the trial. Defendants will be unable to fully defend themselves against plaintiff's claims and the jury will be hearing testimony in a vacuum while being deprived of knowing what was in the officers' minds as they approached the plaintiff that night.

Moreover, this is an action for money damages and plaintiff is also seeking punitive damages against Officers Burbridge and Randall. The Court, by insulating plaintiff from any reference to his criminal history, is depriving the officers of the ability to defend themselves against a possible monetary judgment.² As an example, at his deposition Officer

² The Court has ruled that defendants cannot cross examine plaintiff concerning his prior convictions, multiple detentions or lengthy incarcerations in state prison for any purpose not even for purposes of veracity and damages. With respect to veracity, the Court has also precluded any mention of plaintiff's failure to pay taxes. At his deposition plaintiff testified that in 2006 (only two years before the incident at issue) he earned at least \$40,000 but did not report or pay any taxes. He also conceded that he knew he owed the government taxes. See Marshall's

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Case 1:10-cv-02714-JBW-VVP Document 68 Filed 09/20/12 Page 5 of 7 PageID #: 1041

Burbridge testified that, apart from the database photo he looked at prior to going on patrol that day, he had never arrested plaintiff prior to May 15, 2008. (See Burbridge dep at p. 13). Officer Burbridge should be allowed to tell that to the jury for purposes of defending against allegations of animus or motivation. Officer Fox who was present at the scene (although not a defendant in this case) is in a similar position. Officers Randall and Burbridge would be hamstrung in their ability to defend themselves.

B. If Defendants are not Permitted to Elicit Testimony from Officer Burbridge Regarding the Database, Plaintiff Should Be Precluded From Cross-Examining the Officers Regarding Statements Made During Their Deposition Related Thereto.

If the Court does not permit Officer Burbridge to testify that he recognized plaintiff from the police database, *a fortiori*, plaintiff should be precluded from cross-examining the officers regarding statements made during their deposition related thereto.

A great deal of the deposition testimony relates to, and is derived from, the fact that Burbridge recognized plaintiff from the police database. During the depositions of both Randall and Burbridge, plaintiff's counsel inquired about (1) the fact that Burbridge recognized plaintiff from having seen his information on a police database cataloguing earlier arrests (here, the 3/15/08 arrest, which was still pending on 5/15/08) and (2) statements made by Burbridge to Randall and Fox just prior to their approaching plaintiff to the effect that Burbridge recognized plaintiff from the database. Such testimony should not be admissible in light of the Court's exclusion of Burbridge's testimony regarding his recognition of plaintiff from the police database.

POINT II

Depo. at 66-67. This clearly goes to plaintiff's veracity and defendants submit that they should be allowed to cross-examine plaintiff on his failure to file or pay income tax.

A911

Case 1:10-cv-02714-JBW-VVP Document 68 Filed 04/20/12 Page 6 of 7 PageID #: 1042

**DEFENDANTS SHOULD BE PERMITTED TO
CROSS EXAMINE PLAINTIFF REGARDING
HIS PRIOR CONVICTIONS, MULTIPLE
DETENTIONS AND LENGTHY
INCARCERATIONS, AS SUCH IS HIGHLY
RELEVANT TO CALCULATION OF
DAMAGES.**

Finally, the Court has ruled that defendants cannot cross-examine plaintiff concerning his prior convictions, multiple detentions or lengthy incarcerations in state prison for any purpose, not even for purposes of veracity and damages. With respect to veracity, the Court has also precluded any mention of plaintiff's failure to pay taxes. At his deposition, plaintiff testified that in 2006 (only two years before the incident at issue), he earned at least \$40,000, but did not report or pay any taxes. He also conceded that he knew he owed the government taxes. See Marshall Depo. at 66-67. This clearly goes to plaintiff's veracity and defendants submit that they should be able to cross-examine plaintiff on his failure to file or pay income taxes.

CONCLUSION

For the foregoing reasons, defendants Police Officers Salim Randall and Michael Burbridge respectfully request that the Court reconsider its earlier ruling excluding testimony regarding Burbridge's recognition of plaintiff from the database, and instead permit defendants to elicit testimony and inquire about that recognition. Moreover, Defendants should be permitted to cross-examine plaintiff concerning his prior convictions, multiple detentions, and lengthy incarcerations, and failure to pay income taxes, as such are highly relevant to the damages calculation.

Dated: New York, New York
April 20, 2012

A912

Case 1:10-cv-02714-JBW-VVP Document 68 Filed 04/20/12 Page 7 of 7 PageID #: 1043

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A913

TRIAL TRANSCRIPT, DATED APRIL 23, 2012
(pp. A913-A944)

REPRODUCED FOLLOWING

A914

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 JOSHUA MARSHALL,
5 Plaintiff,

6 versus 10-CV-02714 (JBW)

7 THE CITY OF NEW YORK,
8 Defendant. United States Courthouse
9 Brooklyn, New York
10 -----x

11 April 23, 2012
12 9:30 A.M.

13 TRANSCRIPT OF HEARING ON MOTIONS
14 Before: HON. JACK B. WEINSTEIN,
15 UNITED STATES DISTRICT JUDGE

16 A P P E A R A N C E S:

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A915

PROCEEDINGS

2

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Official Court Reporter

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Facsimile: (718) 613-2480

3 E-mail: Judi_Johnson@nyed.uscourts.gov

4
5 Proceedings recorded by computerized stenography. Transcript
6 produced by Computer-aided Transcription.
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A916

PROCEEDINGS

1 THE CLERK: Civil part in motions -- for trial and
2 motion, Marshall versus City of New York, et al.

3 Counsel state your appearances, please, for the
4 plaintiff.

5 MR. COHEN: Gerald Cohen for Plaintiff Joshua
6 Marshall.

7 MR. NORINSBERG: Jon Norinsberg for Plaintiff Joshua
8 Marshall.

9 MS. GROSS: Good morning, Your Honor. Felicia Gross
10 for defendants Officers Burbridge and Randall.

11 MS. CASTRO: Johana Castro from the Office of the
12 Corporation Counsel for the defendants. Good morning, Your
13 Honor.

14 THE COURT: Good morning.

15 MS. SANDS: Frances Sands, also from the Office of
16 the Corporation Counsel.

17 Your Honor may I be heard?

18 THE COURT: Yes, in a moment.

19 Yes.

20 MS. SANDS: Your Honor, I just wanted to say that
21 I'm here in a supervisory capacity. I will not be examining
22 any witnesses. But I would hope that if I felt that I had
23 something worthwhile to say in the course of arguing legal
24 issues, that the Court will hear me.

25 THE COURT: Yes, I will hear you.

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PROCEEDINGS

4

1 Any motions?

2 MS. GROSS: Yes, Your Honor. I believe there's a
3 motion for reconsideration pending. Yes. Defendants would
4 ask that the court reconsider at least one perhaps and two of
5 its rulings on the motions in limine.

6 First, Your Honor, we would ask that you reconsider
7 the motion with respect to Officer Burbridge's testimony that
8 he knew Plaintiff Marshall from having seen his photo in a
9 police department database in connection with the 3-15 arrest.

10 Your Honor, we believe that's relevant both to his
11 state of mind and to his ability to explain fully what
12 happened on the date of incident. It goes to his thought
13 process as he sees Marshall on the corner of Broadway and Park
14 Streets, and it goes to his ability to fully explain what
15 happened. I mean, without that crucial piece of information,
16 the picture is incomplete as to why the officers stopped
17 plaintiff.

18 THE COURT: The issue is not whether they stopped
19 him or not. That's not of any relevance here. The issue is
20 whether they saw an event, namely, taking the gun out of
21 waistband and throwing it onto the street.

22 MS. GROSS: Right. We agree, Your Honor. But we
23 also think that that one piece of information is relevant to
24 the res gestae, the events that leading up to what led to
25 their attention being drawn to this plaintiff. It's part of

A918

PROCEEDINGS

1 the story they have to tell as to why their attention was
2 focused on plaintiff that particular night.

3 THE COURT: Nobody's contesting that they weren't
4 doing their duty when they focused on him. I don't understand
5 the problem. It's a crime related neighborhood, and it's
6 early in the morning. Two men are walking along the street.
7 Otherwise, I take it, deserted.

8 MS. GROSS: That's correct, Your Honor. And I
9 understand from our hearing last time that Your Honor has
10 ruled that the circumstances of the initial stop are not at
11 issue. Nevertheless, I do believe that the fact that Officer
12 Burbridge recognized this plaintiff is relevant to his thought
13 process at the time.

14 THE COURT: What thought process? I don't
15 understand.

16 MS. GROSS: It's part of -- it's part of the
17 totality of the circumstances, the totality of what made him
18 and the officers focus on and decide to stop --

19 THE COURT: Would it have affected his ability to
20 see what he says he saw? Is that the thought process you're
21 talking about?

22 MS. GROSS: No. It's an additional factor that led
23 him to focus in on that plaintiff and to approach him.

24 THE COURT: Nobody's contesting that he was doing
25 his job when he focused on the defendant -- the plaintiff in

A919

PROCEEDINGS

6

1 this case, rather. Criminal defendant. Plaintiff in the
2 civil case. Have you looked at United States v. Scott?

3 MS. GROSS: I have not, Your Honor.

4 THE COURT: It's decided by the United States Court
5 of Appeals, decided April 16th, 2012. You might want to look
6 at it because it bears fairly closely on this point.

7 MS. GROSS: Very well, Your Honor.

8 THE COURT: The motion to reconsider is denied.

9 MS. GROSS: Okay. Your Honor, if the testimony by
10 Officer Burbridge that he saw or he -- he saw the plaintiff in
11 a police database and therefore knew him is out, I would also
12 ask that much of the deposition testimony that relates to that
13 fact also be excluded.

14 THE COURT: Yeah.

15 MR. NORINSBERG: We're not planning on asking him
16 about reviewing the police database or any of the prior stops
17 based on the court's ruling. We're not going to ask any of
18 those questions.

19 THE COURT: Then take out the deposition dealing
20 with that.

21 MR. NORINSBERG: We made massive edits to the
22 cross-examination based on the court's ruling last week.

23 THE COURT: You made what?

24 MR. NORINSBERG: I edited the cross-examination to
25 take out all of those sections that related to those

A920

PROCEEDINGS

1 questions.

2 THE COURT: Okay. If you go across the line, you're
3 going to be opening doors.

4 MS. GROSS: Okay. Your Honor, if you could just
5 note the defendant's objection.

6 THE COURT: Yes, noted.

7 MS. GROSS: The second motion for reconsideration or
8 the second point that we'd like to be reconsidered is
9 admissibility of plaintiff's criminal history. It's
10 admissible, or felonies are admissible under Federal Rule of
11 Evidence 609. From the city's perspective, or from the
12 defendant's perspective, it goes to the plaintiff's veracity
13 as well as to damages, both for the reasons we discussed last
14 time, that a previously incarcerated person, their damages are
15 less for a subsequent incarceration. And even more
16 relevant --

17 THE COURT: They're not asking for lost wages.

18 MS. GROSS: They are not. But it is also relevant
19 in this respect: Plaintiff is claiming that he was
20 incarcerated for four months as a result of this false arrest.
21 That four months, from defendant's perspective, was a result
22 of the fact that he was unable to make the \$25,000 bail. Bail
23 was set that high in part because he had multiple priors.

24 THE COURT: \$25,000 is minimum bail. I take
25 judicial notice of it.

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1 MS. GROSS: Your Honor, if you could note our
2 objection to that as well.

3 THE COURT: Yes. Noted.

4 MS. GROSS: Finally, Your Honor, we'd like to also
5 ask you to reconsider our ability to cross-examine plaintiff
6 with respect to his failure to file income taxes in 2006. In
7 his deposition testimony, he testified that he made \$40,000 in
8 2006 and did not file income taxes.

9 THE COURT: What have you got to say about that?

10 MR. COHEN: Your Honor, as your ruling was at the
11 original conference, that this was too prejudicial, that my
12 client -- again, it's taking away -- the focus away on what
13 happened the night of the incident. This is to focus on my
14 client as a bad -- has a bad character or has done something
15 that would make the jury be biased towards my client. This
16 has nothing to do with what happened on March 15th, 2008.

17 THE COURT: It certainly goes to veracity.

18 MR. NORINSBERG: There's no lost earnings claim,
19 respectfully, Your Honor. So, I mean, I think if there were a
20 lost earnings claim, it would be relevant to the extent that
21 it bears on that claim, but we don't have a lost earnings
22 claim. So I think whatever minimal probative value it is is
23 really outweighed by a very significant prejudicial value.

24 Like the Court has been saying, we just want the
25 jury to focus on the simple factual dispute here of whether or

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1 not he had a gun, without allowing these extraneous factors to
2 influence the jury's decision.

3 THE COURT: I'm going to affirm my decision. I've
4 tried to keep the case as hygienic as possible. I may have
5 taken all the blood out of it.

6 MS. GROSS: With due respect, Your Honor,
7 irrespective of the fact that the lost wages claim is out of
8 the case, it's defendant's position that nevertheless his
9 failure to file income taxes goes to his veracity. So if you
10 would note the defendant's objection.

11 THE COURT: Yes, it does bear on veracity to some
12 extent. But given the circumstances under Rule 403, I'm
13 keeping it out.

14 What else?

15 MS. GROSS: Your Honor, if you would note our
16 objection.

17 THE COURT: Yes.

18 MS. GROSS: Your Honor, defendants made several
19 motions in limine that were denied last time. For the record,
20 if you don't mind, I'd like to renew them briefly.

21 One is that all evidence of DNA and fingerprint
22 evidence be out. It's not relevant, and it's too prejudicial.

23 Another is that statements made --

24 THE COURT: Well, what's your objection to that? I
25 don't know what your point is.

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1 MS. GROSS: Defendants believe that the DNA evidence
2 and fingerprint evidence should be excluded from the case.

3 THE COURT: There is none.

4 MS. GROSS: There is none, right. But a mention of
5 it should be --

6 THE COURT: Well, they're going to ask, and they're
7 going to argue --

8 MS. GROSS: Right.

9 THE COURT: -- there's no DNA evidence here. And
10 half the jurors who watch these crime things on TV are going
11 to say in the jury room, where's the DNA evidence? Where's
12 the fingerprint evidence? And you're going to lose. I just
13 had a case like that. I explained that to you, and I
14 suggested that you meet it by explaining to the jury through a
15 witness that you never get DNA evidence, and that's the way
16 these cases are. So I don't understand what you want me to
17 do.

18 MS. GROSS: Right. If you would just note our
19 objection and our view.

20 THE COURT: Objections to what? What would you like
21 me to do about DNA evidence? I'll do anything you want. What
22 would you like me to do about the lack of any DNA evidence and
23 the lack of fingerprint evidence that they are going to skewer
24 you on.

25 MS. GROSS: We'll withdraw our objection to that.

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1 THE COURT: Well, are you going to do anything about
2 it?

3 MS. GROSS: We are.

4 THE COURT: What are you going to do?

5 MS. GROSS: We intend to call two witnesses.

6 THE COURT: All right. They're going to object to
7 it. What are you going to --

8 MR. COHEN: In light of that -- I'm glad they
9 brought it up. They did propose a witness that they intend to
10 call from the chief medical examiner's office but have not
11 provided us any of the disclosures pursuant to Federal
12 Rule 26.

13 THE COURT: I told you to give them Rule 26
14 material.

15 MS. CASTRO: We did, Your Honor. We provided them
16 with a CV of the criminal list as well as informed them where
17 she's testified. We did not give them a list of specific
18 cases, just noted that she's testified before grand juries in
19 supreme courts in the five boroughs, as well as informed them
20 that she is not being paid because she's an employee of the
21 Office of the Chief Medical Examiner.

22 MR. COHEN: But there's no statement as to what she
23 is going to be testifying to.

24 THE COURT: She's going to testify, I take it, that
25 normally they don't get any DNA or fingerprint evidence from

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1 these guns.

2 MR. COHEN: But we don't have a report on this
3 particular --

4 MS. CASTRO: There is a report, Your Honor, that
5 specifically states there was no DNA available in this case.
6 We've provided that.

7 MR. NORINSBERG: It actually doesn't say that, Your
8 Honor.

9 MR. COHEN: And Your Honor --

10 THE COURT: Well, let me see the report. You know
11 what she's going to say.

12 MR. NORINSBERG: It doesn't set forth the opinion.
13 In terms of cross-examining this witness, we would like to
14 know what the actual opinion is.

15 THE COURT: Let me see the statement.

16 MS. SANDS: Your Honor, can I add one thing? This
17 witness actually was the supervisor who reviewed the report.
18 She is a fact witness.

19 THE COURT: Let me see her statement under Rule 26,
20 is what I asked for.

21 MS. CASTRO: (Handing.)

22 THE COURT: Where is her statement under Rule 26?

23 MS. CASTRO: It's that page, Your Honor.

24 THE COURT: Which page?

25 MS. CASTRO: The one I had it turned to.

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1 THE COURT: This page, the laboratory report?

2 MS. CASTRO: Yes, Your Honor.

3 THE COURT: That's not what Rule 26 requires.

4 MS. SANDS: Your Honor, this witness --

5 THE COURT: Excuse me.

6 MS. CASTRO: Rule 26 requires that we turn over the
7 report setting forth the expert's opinion.

8 THE COURT: What is she going to say? There are two
9 problems. Was there DNA and fingerprint evidence? This says
10 there was not.

11 MS. CASTRO: That's correct.

12 THE COURT: The other part of it was we normally
13 don't get DNA and fingerprint evidence. That's the crucial
14 part of the evidence. Where is the report saying that she's
15 going to say that?

16 MS. CASTRO: This witness is actually also a fact
17 witness because that is her report. She was the supervisor at
18 the laboratory when this examination --

19 THE COURT: Excuse me.

20 Is somebody going to say to say to this jury that in
21 these kinds of cases, we don't get DNA or fingerprint
22 evidence, which is the crucial evidence, I suggest, that you
23 must give to this jury, which will come to this case with
24 misconceptions. What are you doing about that?

25 MS. CASTRO: This fact witness is capable of

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1 testifying to that in her experience as to why DNA is not --

2 THE COURT: That is an opinion, not a fact witness.

3 The fact witness part is the laboratory report.

4 MS. CASTRO: Right.

5 THE COURT: When are you going to give us that
6 opinion and report?

7 MS. CASTRO: She does not draft that report.

8 THE COURT: You know, I was so explicit. I tried to
9 help you, but you don't listen to me. And I say that with due
10 respect because all three of you are wonderful lawyers, and I
11 respect you. But I don't seem to be making myself clear, and
12 it's undoubtedly due to my own inadequacy.

13 Somebody has to come in from your side and say that
14 we do not get in these cases DNA or fingerprint evidence, and
15 that's why we didn't get it here. Not because he didn't touch
16 the gun, but we never get it. To overcome the prejudice that
17 the jurors will come into the court and discuss in their
18 decisions in trying to come to a verdict when they will say
19 there's no DNA evidence from this guy, so he wasn't guilty --
20 I just had a case, I explained to you, where an open-and-shut
21 case by the prosecutor was lost because the jurors had that
22 misconception.

23 Now, that is an opinion. Where is the statement
24 about that opinion? Not what you've given me. That's
25 different. What you've given me is going to help the

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1 plaintiffs.

2 MS. SANDS: Your Honor, may I be heard?

3 THE COURT: Do you understand the point I'm trying
4 to make? I know I'm inarticulate.

5 MS. CASTRO: Not at all, Your Honor. I do
6 understand what you're saying, and this particular witness is
7 capable of stating that reason.

8 THE COURT: I understand she's capable, but you have
9 to give that to the other side. That's what Rule 26 says.
10 That's the opinion she's giving as an expert, not as a fact
11 witness.

12 MS. SANDS: Your Honor, may I just have some
13 clarification?

14 Your Honor, I don't want to beat a dead horse here,
15 and you've been perfectly clear, but let me just explain a
16 little further our opinion.

17 This is a woman who works ME's office as a
18 supervisory criminologist. She supervises the criminologists
19 who work under her. She reviewed the report. She's done in
20 her career hundreds of DNA analyses. She can testify that in
21 her experience with these types of gun cases, that there isn't
22 typically fingerprints -- I mean, there isn't typically DNA.

23 THE COURT: I'm reading from Rule 26 of the Rules of
24 Civil Procedure, which I respectfully brought to your
25 attention the last time you were here. And Rule 26 --

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1 MR. COHEN: 2(b)(1).

2 THE COURT: -- (a)(2)(B): "The report must contain
3 a complete statement of all opinions the witness will express
4 and the basis and reasons for them."

5 Are you telling me she's going to express the
6 opinion that normally we don't get DNA and fingerprints from
7 these guns?

8 MS. SANDS: She's going to say that, in her
9 experience doing these DNA analyses --

10 THE COURT: Then why isn't it in the report, as
11 required by Rule 26?

12 MS. SANDS: This is really a hybrid witness, Your
13 Honor. Because she has experience --

14 THE COURT: Why isn't it in the report under
15 Rule 26?

16 MS. SANDS: Because she's actually a fact witness.
17 I mean, she reviewed this report in the context --

18 THE COURT: She is a fact witness and an opinion
19 witness. I tried to explain that to you.

20 Rule 703 is the basis for the expert's opinion.
21 Rule 701 deals with opinion testimony by lay witnesses, and
22 702 deals with testimony by an expert witness. Rule 702,
23 subdivision A, the expert's scientific, technical or other
24 specialized knowledge, and you're telling me it's the
25 specialized knowledge from hundreds of cases. So she's

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1 testifying as an expert witness and as a fact witness under
2 Rule 701. Now, I don't understand what the reluctance of the
3 city is to provide what the rules, as I've tried and due to my
4 own defects, unsuccessfully, to explain to you is required in
5 this case.

6 MS. SANDS: Your Honor, we can provide a brief
7 statement.

8 THE COURT: I want you to provide what Rule 26
9 requires in this case and to do it promptly, and I don't
10 understand why there's what appears to be a flouting of the
11 rulings of the Court in this respect.

12 Now, what is the application?

13 MR. COHEN: Your Honor, I ask that this witness be
14 precluded.

15 THE COURT: Denied.

16 MR. COHEN: We're on the day of trial.

17 THE COURT: I'm not going to preclude.

18 MR. COHEN: We haven't had a chance to look at this,
19 maybe call a witness of our own, explore this.

20 THE COURT: I laid this out for you fully. You
21 understood the problem. If you want a continuance, I'll give
22 you a continuance. I'll give it to you right now. We will
23 hear openings this morning, and we will stop at 12:00. And
24 the city can get its own Rule 26 material together, and you
25 can go out and get whatever witness you want. You knew about

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1 this. I laid it out for you.

2 Anything else?

3 MS. SANDS: Your Honor, you also mentioned that
4 there would be a Daubert hearing. So I think that, all things
5 considered, that would be sufficient.

6 THE COURT: I don't need a Daubert hearing. They
7 haven't applied for one.

8 MR. COHEN: Yes, Your Honor, we did discuss that.

9 THE COURT: You want a Daubert hearing of this
10 witness? Where is the witness?

11 MS. CASTRO: We will bring her in the day she will
12 testify, which we anticipate is tomorrow.

13 THE COURT: Obviously she's going to be qualified.
14 But if you want to go through the motion, we'll go through the
15 motion.

16 MR. COHEN: We'd would just like to make a record.
17 All the plaintiff is noting is that it's the day of trial.
18 Your Honor did direct us to have the Rule 26 disclosures to --
19 you directed the city to have it to plaintiff before the day
20 of trial. Certainly the week we had. And we haven't gotten
21 it. We have no idea what this witness is going to testify to.
22 We have no idea what she's going to say.

23 THE COURT: You have no idea?

24 MR. COHEN: I have some idea. But, you know, this
25 report that they have isn't clear. It isn't clear as it is.

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1 THE COURT: I see. I understand your position.

2 MR. COHEN: If you look at the next page of the
3 report, they said that further DNA testing could be performed.

4 THE COURT: I understand.

5 MR. COHEN: So I don't know what --

6 THE COURT: What is your application and what is
7 your --

8 MR. COHEN: I made the application. Your Honor
9 denied it. So I'll leave it alone.

10 THE COURT: All right. We have that on the record.
11 Anything further that I can help you with?

12 MS. GROSS: Your Honor, if I could just continue
13 noting my objections to the record with respect to Your
14 Honor's motions in limine, particularly with respect to
15 statements made or allegedly made by one of the officers to a
16 federal agent. There's a document in the disclosure that I
17 believe plaintiff intends to use that contains double hearsay.
18 A statement the officer allegedly made to members of the U.S.
19 Attorney's Office in the Eastern District contains the
20 statement that he did not see plaintiff in possession of the
21 gun. We ask that that be excluded because it is double
22 hearsay.

23 THE COURT: Are you going to call in the agent?

24 MR. COHEN: No. I don't know why we're doing this
25 again, Your Honor.

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1 THE COURT: I told you you can use it to refresh.

2 MR. COHEN: Yeah.

3 THE COURT: But not as evidence.

4 MR. COHEN: We're rehashing, I think, all of the --

5 THE COURT: We went over this.

6 MS. GROSS: If you could note the objection.

7 MR. COHEN: Objection to what? I don't understand.

8 What's the objection.

9 MS. GROSS: Use of it at all.

10 THE COURT: Don't talk to each other. Talk to me.

11 MS. GROSS: The defendant objects to the use of that
12 document whatsoever.

13 THE COURT: Even to refresh?

14 MS. GROSS: Yes. I mean, it contains double
15 hearsay.

16 THE COURT: Overruled.

17 MS. CASTRO: Your Honor, our next line of motions
18 pertains to the jury charge. I don't know if Your Honor wants
19 to discuss that now or at another point.

20 THE COURT: Yes. I tried to take care of
21 everybody's objections. Some of them were very good.

22 MR. COHEN: Plaintiff's position is it probably
23 would be more fruitful, once the evidence has been given to
24 the jury and how it plays out, to have a jury instruction
25 towards the end ever the trial.

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1 THE COURT: I'll hear you now.

2 MS. CASTRO: Yes, Your Honor.

3 THE COURT: Indicate the page.

4 MS. CASTRO: Well, I guess first, with respect to
5 the first page, during our last conference, the city noted
6 that it was no longer a party. On Page 1, the caption, we
7 would request that the City of New York be removed as it's no
8 longer a party, as well as the John Doe defendants.

9 THE COURT: Okay. You want the City of New York
10 out?

11 MS. CASTRO: Yes, Your Honor. As well as John Does.

12 MR. COHEN: We have no objection to that, Your
13 Honor.

14 MS. CASTRO: Then on Page 7, the second-to-last
15 paragraph, the last sentence was added in the April 20th
16 charge, the "however, you're permitted to consider the fact
17 that the charges against the plaintiff were later dismissed in
18 determining whether probable cause to arrest existed."

19 THE COURT: Yes.

20 MS. CASTRO: We would object to that last,
21 particularly in light of the Supreme Court's decision in
22 Pearson v. Ray, which particularly states: "Under the
23 prevailing view in this country, a police officer who arrests
24 someone with probable cause is not liable for false arrest
25 simply because the innocence of the suspect is later proved."

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1 MR. COHEN: Your Honor, we're not saying because --

2 THE COURT: Excuse me.

3 MS. CASTRO: Your Honor, we were much more
4 comfortable with the language that Your Honor proposed in the
5 April 17th charge, which states "whether charges were dropped
6 or whether the plaintiff was acquitted or convicted of a crime
7 is irrelevant on this issue," and we ask that that language be
8 used instead of the language in the April 20th charge.

9 MR. COHEN: May I be heard?

10 THE COURT: Yes.

11 MR. COHEN: Your Honor, that's not the law of the
12 Circuit, and the quote that was just read by Ms. Castro
13 doesn't -- it states simply because there was a dismissal, it
14 doesn't mean that you're falsely arrested, and that's not what
15 we're saying. We're saying what the law of the Circuit
16 clearly states. The fact of dismissal can be used as relevant
17 evidence to refute probable cause. It's one piece of many
18 different parts of the puzzle to show that there was no
19 probable cause. And that is clearly supported by the Second
20 Circuit case law in Wayne v. Oaks, which adopts the Court of
21 Appeals decision, New York Court of Appeals decision, states
22 specifically the fact of dismissal can be one piece of
23 evidence to refute the existence of probable cause. That is
24 what the law states.

25 MS. CASTRO: And if I may add and to distinguish

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1 from the case here, the plaintiff there was taken to trial,
2 and he was found not guilty by the criminal jury. In this
3 case, it was dismissed on speedy trial grounds.

4 MR. COHEN: There is no claim in this case -- well,
5 there's no dispute there wasn't a favorable termination here.
6 There could be many reasons why this case went speedy trial
7 the way it went. Your Honor, I'm a former prosecutor. Cases
8 that -- especially serious cases like this that went speedy
9 trial, they went speedy trial not because officers -- not
10 because the D.A.'s office made a mistake or some technicality.
11 They did so because they didn't believe in the case because
12 they had some real questions about the case. And we can make
13 that argument, but since we're not calling the D.A. here,
14 we're not challenging favorable termination here, we're not
15 going to -- we shouldn't get into that.

16 THE COURT: All right. I will amend it as follows.
17 It will read: You may consider as one piece of evidence,
18 together with all the evidence in the case, the fact that" --

19 MR. COHEN: That's fine.

20 THE COURT: -- and go on.

21 MS. CASTRO: Your Honor, we would still object to
22 that statement.

23 THE COURT: Next?

24 MS. CASTRO: The next issue that we would like to
25 address is including language that pertains to the collective

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1 knowledge doctrine. It's still within the false arrest.

2 THE COURT: Would you direct me, please, to a page
3 and line.

4 MS. CASTRO: I would still say it would be on
5 Page 7.

6 THE COURT: Line?

7 MS. CASTRO: It's to add language, not any language
8 that's already in there. The language that we would propose
9 specifically would be: "An officer acts lawfully when he
10 reasonably relies upon the information received by other law
11 enforcement officials. Thus if the collective knowledge of
12 the officers on the scene of the crime is of such weight and
13 persuasiveness as to convince an officer of ordinary
14 intelligence, judgment and experience that there is probable
15 cause to arrest, then the officer relying on that information
16 also has probable cause to arrest."

17 MR. COHEN: Can I have a moment to respond to that
18 suggestion?

19 THE COURT: Just a moment.

20 Yes.

21 MR. COHEN: Your Honor, that suggestion doesn't
22 apply to the facts in this case. Both defendants at, their
23 depositions, testified very clearly there was no mistaking.
24 They both saw my client throw this gun. So this collective
25 knowledge doctrine isn't applicable here. It wasn't that one

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1 was relying on the another for that information. It was very,
2 very clear in the deposition testimony. In fact, you know, if
3 they had said, well, we may have been mistaken, we probably
4 wouldn't be here today, because then they would have the
5 defense of qualified immunity. But they don't, because they
6 were very clear, we absolutely saw my client throw the gun,
7 and that can't exist with a charge like that. It will confuse
8 the jury it. It doesn't make any sense in this case.

9 THE COURT: I think under these circumstances, one
10 officer may have been influenced by another in making
11 observations simultaneously. So I'll add: "An officer may
12 rely on information supplied to him by another officer who
13 made observations at the scene." I think that's accurate.

14 What else?

15 MS. CASTRO: The next page, on Page 8, with respect
16 to the malicious prosecution case -- I'm sorry malicious
17 prosecution claim, we would like an instruction concerning the
18 presumption of probable cause that would be a result of the
19 indictment by the grand jury. So in the first paragraph after
20 the last sentence, which states that plaintiff was indicted by
21 a grand jury of three counts of criminal possession of a
22 weapon, we would just like to include a sentence stating that
23 the indictment creates a presumption of probable cause.

24 THE COURT: I'm not giving it in this case. They
25 either lied to the grand jury or they were telling the truth.

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1 I'm not giving a presumption charge.

2 MS. CASTRO: We just ask that that objection be
3 noted.

4 THE COURT: Yes.

5 MS. CASTRO: Next would be the third paragraph of
6 the malicious prosecution claim. Previously Your Honor had
7 language stating that the criminal case against the plaintiff
8 was dismissed for failure to comply with speedy trial rules,
9 and that's in the April 17th charge. It's been changed to
10 just simply state that the charges were dismissed in May of
11 2009. We would request that Your Honor reconsider and include
12 the language that he previously charged.

13 THE COURT: Charges were dismissed in May of 2009
14 for violations of speedy trial rule, you want?

15 MS. CASTRO:

16 MR. NORINSBERG: Your Honor, can we be heard on
17 that?

18 THE COURT: Yes.

19 MR. NORINSBERG: The law in the -- the state of the
20 art, the Court of Appeals law is that if it's dismissed on
21 speedy trial grounds, that's sufficient to establish favorable
22 termination. And the case we're relying on is Cantolino,
23 C-A-N-T-O-L-I-N-O. The bottom line is it's irrelevant what
24 the reason is. Once the courts have acknowledged that that is
25 favorable termination, it doesn't matter why. And my concern

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1 is that the jury hears it's on speedy trial grounds, and they
2 improperly conclude that it's some type of technicality, when
3 the Court of Appeals has said it's not a technicality, and
4 that an accused should not have to stretch out, you know, a
5 litigation and go to trial in order to preserve his malicious
6 prosecution claim.

7 MS. CASTRO: And, Your Honor, we would submit in
8 response to that that it would be highly unfair for the jury
9 to assume or be left to assume that the case was dismissed for
10 a reason attributable to the officers. And for that reason, I
11 think it is important to note the reason for the dismissal,
12 speedy trial grounds.

13 MS. SANDS: Your Honor, in this case, bail was set.
14 The plaintiff couldn't make bail. That's the reason why he
15 was in for four months. The officers are not responsible for
16 the amount of bail that was set. They weren't present at the
17 bail hearing. And the plaintiff here is clearly claiming that
18 the officers -- that he was in four months because of
19 something attributable to the officers, and that's not the
20 case.

21 MR. COHEN: Your Honor, the proximate cause of the
22 false arrest and the malicious prosecution, the false
23 statements made to the D.A.'s office to charge what they
24 charged is directly attributable to the officers. To now say
25 that the \$25,000 bail can't be attributable to them, that's

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1 just completely against common sense.

2 MR. NORINSBERG: And it's also against the law of
3 the Circuit under Poser, P-O-S-R, versus City of New York,
4 where the Second Circuit actually explicitly said that it's
5 reasonably foreseeable that if an officer charges somebody
6 with a higher charge, that could result in a more lengthy
7 detention. So they are responsible. It doesn't break the
8 causal link if there's a bail determination involved.

9 THE COURT: I'm going to take that sentence out.
10 The only sentence we need is, "There is no dispute that
11 criminal proceedings were commenced and continued" by
12 defendant -- "and continued" --

13 MS. CASTRO: Your Honor, we would actually
14 object to --

15 THE COURT: Excuse me. May I finish?

16 -- "and continued and that they ended in his favor."
17 That's what it will say.

18 MS. CASTRO: Our objection is to the "continued."
19 We would dispute that the defendant continued the prosecution
20 against the plaintiff.

21 THE COURT: I didn't say -- let me read it again.

22 "There is no dispute that criminal proceedings were
23 commenced and continued and that they ended in plaintiff's
24 favor."

25 What else do you have?

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1 MS. CASTRO: Your Honor, we would just note our
2 objection to the fact that the speedy trial language is not
3 included.

4 THE COURT: Yes.

5 MS. SANDS: Your Honor, one --

6 THE COURT: Excuse me.

7 Did you have anything else for me?

8 MS. CASTRO: Your Honor, just with respect to that,
9 we would also note that the way it reads sounds like plaintiff
10 was acquitted by a jury.

11 MS. SANDS: Actually, that is what I was going to
12 say, Your Honor. We know that the presumptions are different
13 at a criminal trial. It's beyond a reasonable doubt. And
14 probable cause arises at the time of arrest with respect to
15 the totality of the circumstances.

16 THE COURT: Yeah. This is for a different claim,
17 malicious prosecution.

18 Now, what do the plaintiffs any objections to the
19 charge?

20 MR. COHEN: Your Honor, we were under the
21 impression that we were going to do a charge conference closer
22 to the end of the case.

23 THE COURT: You are not prepared to discuss it?

24 MR. COHEN: We would like to reserve our right to --

25 THE COURT: We'll discuss it tomorrow at 9:30 a.m.

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1 I'm owe told the magistrate was stuck in traffic and there are
2 problems on the Long Island Railroad and we're having trouble
3 getting jurors.

4 We should be able to get a jury selected today,
5 shouldn't we?

6 THE CLERK: Yes.

7 THE COURT: And we'll start with the actual trial
8 tomorrow, 10:00, and I'll see counsel at 9:30, when we can
9 continue this pleasant discussion.

10 MS. SANDS: Thank you, Your Honor.

11 MR. NORINSBERG: Your Honor, being that we're going
12 to have that schedule, would it be possible that the
13 defendants provide us with a report by the end of today on the
14 expert?

15 THE COURT: Try to do that.

16 MS. SANDS: We'll try to do that, Your Honor.

17 THE COURT: Anything further this morning?

18 MS. CASTRO: No, Your Honor.

19 (Continued on the next page.)
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PROCEEDINGS

1 (Whereupon, the matter was adjourned to April 24, 2012 at 9:30
2 a.m.)

3

4

CERTIFICATE OF REPORTER.

5 I certify that the foregoing is a correct transcript of the
6 record of proceedings in the above-entitled matter.

7

8

9 Judi Johnson, RPR, CRR, CLR
10 Official Court Reporter

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TRIAL TRANSCRIPT, DATED APRIL 24, 2012
(pp. A945-A1186)

REPRODUCED FOLLOWING

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1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 JOSHUA MARSHALL,
5 Plaintiff,

6 versus

10-CV-02714 (JBW)

7 THE CITY OF NEW YORK,
8 Defendant. United States Courthouse
9 Brooklyn, New York
10 -----X

11 April 23, 2012
12 9:30 A.M.

13 TRANSCRIPT OF TRIAL
14 Before: HON. JACK B. WEINSTEIN,
15 UNITED STATES DISTRICT JUDGE

16 A P P E A R A N C E S :

17 FOR THE PLAINTIFF:

18 COHEN & FITCH, LLP
19 Attorneys for the Plaintiff
20 Woolworth Building
21 233 Broadway - Suite 1800
22 New York, New York 10279

23 BY: GERALD M. COHEN, ESQ.
24 JON NORINSBERG, ESQ.

25 For the Defendants:

NEW YORK CITY LAW DEPARTMENT
Attorney for the Defendant
100 Church Street
New York, New York 10007

BY: FELICIA GROSS, ESQ.
JOHANA CASTRO, ESQ.
FRANCES SANDS, ESQ.

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2

1 Court Reporter: Judi Johnson, RPR, CRR, CLR

Official Court Reporter

2 Telephone: (718) 613-2582

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4
5 Proceedings recorded by computerized stenography. Transcript
6 produced by Computer-aided Transcription.
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1 (In open court.)

2 COURTROOM DEPUTY: All rise. The United States
3 District Court for the Eastern District of New York is now in
4 session. The Honorable JACK B. WEINSTEIN is now presiding.

5 (Honorable JACK B. WEINSTEIN takes the bench.)

6 COURTROOM DEPUTY: Calling civil trial proceedings
7 in Docket no. 10-CV-2714, Joshua Marshall against The City of
8 New York.

9 THE CLERK: Counsel, please note your appearances
10 for the record.

11 MR. COHEN: For the Plaintiff, Joshua Marshall,
12 Cohen & Fitch, LLP by Gerald Cohen.

13 Good morning, your Honor.

14 MS. GROSS: For the defendant, The City of New York,
15 Corporation Counsel by Felicia Gross. And with me is Frances
16 Sands and Johana Castro.

17 THE COURT: Is there any application?

18 MR. COHEN: Yes. Your Honor, directed me to come up
19 with some objections that I had for the proposed jury
20 instructions.

21 THE COURT: Yes.

22 MR. COHEN: There's a few things, just minor
23 tweaking that I'd like to suggest to the Court.

24 THE COURT: I'll hear them.

25 MR. COHEN: On Page 7, under the false arrest

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1 section.

2 THE COURT: Yes.

3 MR. COHEN: In the third paragraph. I raised this
4 on my letter, and I'd like to just try one more time to
5 convince the Court that this is not a case where there is an
6 issue of objectively reasonable grounds for the officers to
7 believe that a crime had been committed. That would suggest
8 that there was some sort of mistake. It suggests the
9 qualified immunity defense. Here, because the facts are what
10 they are in this case, that the officers clearly state that
11 they saw my client throw a gun, then there wouldn't be an
12 objectively reasonable grounds. Either they saw it or didn't
13 see it. So it's purely a subjective, in this particular case.

14 THE COURT: They might have thought they saw it.

15 MR. COHEN: Yeah, but that's not what they've
16 claimed.

17 THE COURT: But they wouldn't know whether what they
18 thought they saw actually occurred.

19 MR. COHEN: I understand. Well, they made it very
20 clear they made no mistake. They were absolutely certain. I
21 just want to make it noted for the record, Your Honor.

22 THE COURT: Yes, that's quite all right. What else?

23 MR. COHEN: There's one more, with respect to the
24 malicious prosecution claim.

25 THE COURT: Yes.

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1 MR. COHEN: That's at Page 8. Defendants raised an
2 issue at the first conference that we had, pretrial conference
3 that we had here regarding Rehberg, the recent Supreme Court
4 decision. And just for the sake of making sure we don't have
5 any appellate issues here in this case with respect to the
6 jury instruction.

7 I do think it may need some mention, not the
8 specific case, of course, but in the first paragraph of the
9 malicious prosecution claim, after -- Your Honor starts off
10 with that they were maliciously prosecuted by providing false
11 statements to the state prosecuting attorney. And then the
12 last sentence says the plaintiff was indicted of the charges.
13 A sentence to the effect of defendants cannot be solely liable
14 for solely making false statements in the grand jury.
15 However, to the extent you find that defendants made such
16 false statements in the grand jury, you can use this to judge
17 their credibility and to infer that they provided the same
18 false statements to prosecuting attorneys outside the grand
19 jury for purposes of this claim.

20 THE COURT: Well, are you relying upon what they
21 said in the grand jury for the malicious prosecution in that
22 claim?

23 MR. COHEN: We're not relying upon it to the extent
24 that we're saying that because they made those false
25 statements, that they should be liable. Rather, we are saying

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1 and we are going to say that the fact that they made those
2 false statements is indicative of what they've also told the
3 district attorney what they -- and it's indicative of their
4 general credibility in this particular case. So just so the
5 record is clear and we don't have any appellate issues on
6 Rehberg, you know, we may -- if the Court believes it may be
7 correct, we may want to just have that in the jury
8 instructions so we don't raise an appellate issue.

9 MS. CASTRO: Your Honor, for the record, we do want
10 to object to counsel's request.

11 THE COURT: Thank you.

12 How does this sound to you, a second paragraph after
13 the first paragraph of the malicious prosecution section. "A
14 defendant cannot be held liable for what he said to the grand
15 jury. He may be held liable for what he said to the
16 prosecutor or district attorney."

17 Is that what you want? Then you can argue
18 credibility as you wish.

19 MR. COHEN: That's fine, Your Honor.

20 THE COURT: Do you object?

21 MS. CASTRO: Your Honor, we do object to the
22 statement, and particularly because what the officers said to
23 the district attorney could be truthful, and here the jury can
24 infer that what they said is truthful and yet still hold them
25 liable.

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1 THE COURT: I don't understand you.

2 MS. CASTRO: The sentence itself, to us --

3 THE COURT: Is it accurate, what I just said?

4 MS. CASTRO: To the extent that Rehberg holds that
5 witnesses cannot be found liable for what's testified to at
6 the grand jury, yes. It's the second portion of the sentence.

7 THE COURT: Well, can't they be held liable for
8 lying to the district attorney, which causes the district
9 attorney to prosecute?

10 MS. CASTRO: If they're found to give false
11 statements, yes.

12 THE COURT: Yes. Well, that's what this is all
13 about.

14 MS. SANDS: Your Honor, wouldn't it be inconsistent
15 if they --

16 THE COURT: I can't hear you. You have to speak up.

17 MS. SANDS: Wouldn't it be if they --

18 THE COURT: I'm sorry?

19 MS. SANDS: It's not inconsistent if they did not
20 lie in the grand jury and they told the prosecutor the same
21 thing that the prosecutor used to put the case before the
22 grand jury.

23 THE COURT: I understand. Whether it was a lie or
24 not is what the jury is determining.

25 MS. SANDS: Right.

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1 THE COURT: So I don't understand your objection,
2 with all due respect.

3 MS. SANDS: I think the way the charge is written
4 now, it's that they may not have lied to the grand jury, but
5 they lied to the prosecutor.

6 THE COURT: Where does the charge say they lied
7 to --

8 MS. SANDS: It doesn't say it, Your Honor, but I
9 think there's an implication which our jury could misinterpret
10 it to be that.

11 THE COURT: Excuse me. That's why we're here in
12 court. The plaintiffs say your clients lied to the
13 prosecutor. They're going to have to prove it. I don't
14 understand your objection, with due respect.

15 MR. COHEN: Your Honor, can I make a suggestion?

16 THE COURT: No. One at a time. I'll be delighted
17 to hear you, but I'm now listening to the corporation counsel.

18 MS. SANDS: Thank you, Your Honor.

19 What I'm trying to explain to the Court is that I
20 think there is a disconnect between the officers telling the
21 grand jury whatever it is they told the grand jury and telling
22 the prosecutor, who presents the case to the grand jury -- or
23 allowing the jury to infer that they lied to the prosecutor
24 and not the grand jury. The prosecutor uses what the officers
25 say to present the case to the grand jury.

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1 THE COURT: I don't follow you. The Supreme Court
2 says, as I understand it, a lie to the grand jury is not the
3 basis for prosecution. Correct?

4 MS. SANDS: Correct.

5 THE COURT: A lie to the prosecutor presumably is a
6 basis, correct? Am I correct or not?

7 MS. SANDS: You are correct, Your Honor. But what
8 I'm saying is there's a disconnect between what they tell the
9 grand jury and what they tell the prosecutor.

10 THE COURT: I don't understand what the word
11 "disconnect" means.

12 MS. SANDS: There's no connection. In other words,
13 if they tell the truth to the grand jury, and that's what the
14 prosecutor uses to come forward with the case.

15 THE COURT: Excuse me. You're assuming they told
16 the truth to the grand jury. I don't know whether they told
17 the truth or not to anybody. We are here this morning because
18 the plaintiff says they lied to the prosecutors; is that
19 right?

20 MR. COHEN: That is correct, Your Honor.

21 THE COURT: Why shouldn't they be able to use that
22 if your client did lie to the prosecutor?

23 MS. SANDS: I understand, Your Honor, that we're
24 here to determine whether or not the officers lied.

25 THE COURT: Excuse me. Why don't you answer my

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1 question?

2 MS. SANDS: I'm trying to answer your question.

3 THE COURT: Would you read my question back to
4 counsel, please.

5 (Whereupon, the referred to portion was read back by
6 the court reporter.)

7 MS. SANDS: Your Honor, what I'm saying is the way
8 the charge is written now --

9 THE COURT: Excuse me. Would you answer my
10 question.

11 Read it again, please.

12 (Whereupon, the referred to portion was read back by
13 the court reporter.)

14 MS. SANDS: To use what?

15 THE COURT: To use the fact that they lied to the
16 prosecutor, that they told the prosecutor an untruth. Why
17 cannot they use it? That's their case.

18 MS. SANDS: I'm not saying that they cannot use it.
19 I'm just saying, Your Honor, the way that the charge is
20 currently written it sounds as if, when I hear it, that they
21 told the truth to the grand jury, but they lied to the
22 prosecutor. That's the way I'm interpreting it when I hear
23 it.

24 THE COURT: Well, I don't agree. I'm going to use
25 it. I'm sorry. Why don't you try to brief it. Perhaps I'll

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1 be able to understand the argument better.

2 MS. SANDS: Your Honor, can I say one more thing?
3 Can I say that can we offer our changes to the Court up until
4 the time the court is ready? In other words, as the case
5 progresses, I would imagine there will be testimony companying
6 out --

7 THE COURT: Yes, of course.

8 MS. SANDS: -- and things will change, that we would
9 present any final edits or changes before the charge is read.

10 THE COURT: It will always know my pleasure to read
11 anything you present and to hear any argument.

12 Are there any other applications?

13 MR. COHEN: One more small change with respect to
14 the jury charge, Your Honor.

15 In the damages section, Your Honor's proposed charge
16 currently has you should award damage --

17 THE COURT: What page?

18 MR. COHEN: I'm sorry. Number 10. Page 10, sorry,
19 in the compensatory damages section.

20 THE COURT: Yes.

21 MR. COHEN: Plaintiff would like some statement as
22 to what the claim of injury is. The plaintiff is claiming
23 essentially that the injury was he spent four and a half
24 months in jail on charges that were not warranted. So to the
25 extent in the second paragraph of the compensatory damages

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12

1 section, plaintiff claims his injury was that he spent four
2 and a half months wrongfully incarcerated as a result of the
3 defendant's actions. Just so the jury understands that that's
4 the injury, and Kurmin v. City of New York was a decision
5 basically that acknowledges loss of liberty as a specific
6 compensatory damage.

7 MS. CASTRO: Your Honor, note our objection to the
8 request. Plaintiff will have an opportunity to relay to the
9 jury what his injuries are, and to just sanitize it and put it
10 down in one sentence is improper.

11 THE COURT: After the third paragraph on Page 10,
12 would this cover the request of the plaintiff? "Plaintiff
13 claims as the injury that he spent four and a half months in
14 jail."

15 MR. COHEN: That's fine.

16 THE COURT: That will go in, subject again to
17 receiving a brief from defendant.

18 Any other applications this morning?

19 MR. COHEN: Yes. Your Honor, last night we -- as
20 Your Honor ordered defendants, we received the disclosures.

21 THE COURT: May I have a copy, please?

22 MR. COHEN: I have a copy for Your Honor. May I
23 approach?

24 THE COURT: Yes.

25 Mark this as Court Exhibit 1 of today's date.

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1 (A report from City of New York was marked as Court
2 Exhibit 1 in evidence, as of this date.)

3 THE COURT: What's the objection?

4 MR. COHEN: So, Your Honor, my objection to this
5 report is that the opinion that's expressed here, which is in
6 one sentence -- it's the third-to-last paragraph on Page 2 --
7 summarizes as follows: In my experience at the office of the
8 Chief Medical Examiner, swabs of firearms submitted for DNA
9 analysis often yield an insufficient amount of DNA, and
10 therefore no further DNA testing can be done. And then
11 Ms. Lamay-Smith goes on and says there may be many factors
12 that can contribute to this; you know, extreme heat, cold,
13 wet, damp or how the item was handled.

14 I'm having an issue with respect this opinion
15 doesn't follow Rule 26 because it doesn't list really the
16 basis and the reasons for it. It just says there may be some
17 reasons. It happens often, but doesn't have a quantified
18 number of how often it happens. It doesn't explain in detail
19 what the particular reasons are. You know, it seems to me
20 that it's just a general opinion that's not really specific,
21 which would meet the Rule 26 requirements.

22 THE COURT: Overruled. It's sufficiently explicit.
23 You can cross-examine, if you wish. I see no reason for a
24 Daubert hearing in view of the experience of your witness.

25 Anything further?

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1 MS. GROSS: Two applications, Your Honor. The first
2 is for the sake of clarity. I recall yesterday that Your
3 Honor ruled that references to the fact that the grand jury
4 indictment or case was dismissed because of Speedy Trial --
5 for Speedy Trial reasons would not be in the jury charge.

6 Does that mean that defense counsel cannot reference
7 the fact that Speedy Trial grounds were the grounds for
8 dismissal in opening and cross-examination of plaintiff as
9 well?

10 THE COURT: Well, what's your intention? What's the
11 plaintiff's intention?

12 MR. COHEN: Well, Your Honor, the request to
13 cross-examine our client on Speedy Trial grounds, my client is
14 not an attorney. He's not the D.A. He can't testify as to
15 whether the case was --

16 THE COURT: As I understand it, the defendant wants
17 you not to reference the Speedy Trial; is that correct.

18 MS. GROSS: I'm sorry. The plaintiff wants to not
19 reference it. Defense counsel does wish to reference it in
20 both opening and cross-examination.

21 THE COURT: You want to reference it?

22 MS. GROSS: Yes.

23 THE COURT: What's your view?

24 MR. COHEN: Our view is that it should not be
25 referenced. It will confuse the jury. It's a way to get in

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1 testimony about what the D.A. did without having the D.A.
2 here, and it's clear that the D.A. is not going to be here.

3 THE COURT: You can subpoena him.

4 MR. COHEN: In addition, it will suggest that this
5 case was dismissed on a technicality, but there are many
6 reasons why cases are dismissed on Speedy Trial grounds. It's
7 because, you know, for the reasons I discussed yesterday, Your
8 Honor. There were serious questions with this prosecution,
9 and the D.A.'s office, rather than outrightly dismiss it on
10 their own, just let it die with the Speedy Trial issue.
11 Asking my client, who's a layperson, to testify about how his
12 case got dismissed or the reason why the D.A.'s office decided
13 to let this case die 30-30 is very speculative, and it's not
14 fair because my client's not an attorney.

15 THE COURT: Do you have a case on it, anybody?

16 MR. COHEN: Whether the issue of Speedy Trial can be
17 raised?

18 THE COURT: Yes.

19 MR. NORINSBERG: Just, Your Honor, the case that we
20 referenced yesterday, the Cantolino case, Court of Appeals,
21 New York State Court of Appeals, which essentially establishes
22 clearly that the Speedy Trial dismissal is a dismissal on the
23 merits for purpose of a malicious prosecution claim, the
24 rationale being that they said in that --

25 THE COURT: Let me see that case.

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1 MS. GROSS: Your Honor, if I might be heard?

2 THE COURT: Yes.

3 MS. GROSS: The defense's position is we concede and
4 we agree that the case law firmly establishes that a Speedy
5 Trial disposition is a favorable disposition for purposes of
6 malicious prosecution.

7 THE COURT: Yes, I know.

8 MS. GROSS: However, we'd simply like to inform the
9 jury that this case was dismissed on Speedy Trial grounds,
10 period, and to ask him if he knows why the case was dismissed.

11 THE COURT: I know what you want to do. But let me
12 see if there's -- if there's no other case discussing it,
13 that's the one I'll have to read. Is there no other case
14 discussing this issue? It's a tricky problem.

15 MS. SANDS: Your Honor, can I add one thing?

16 THE COURT: Yes.

17 MS. SANDS: The plaintiff testified at his
18 deposition that the case was dismissed pursuant to Speedy
19 Trial.

20 THE COURT: That's not helpful, with all due
21 respect.

22 MS. SANDS: Well, in terms of counsel's remark that
23 the plaintiff is not a lawyer, he does know why the case was
24 dismissed.

25 THE COURT: The trouble with cutting this out or

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1 letting it in is that you have to tell the jury so much about
2 the way the criminal justice system operates for them to
3 understand it.

4 Well, unless the defendant can come up with a case
5 that's helpful, I'm going to keep it out, I think. Let me
6 look at the New York case. So I don't want any reference to
7 it in the opening.

8 MS. GROSS: Your Honor, if I might be heard just
9 briefly. The defendant's intention is to simply alert the
10 jury that it was a Speedy Trial dismissal and not an acquittal
11 after trial.

12 THE COURT: I understand what your intention is.

13 MS. GROSS: If I might be heard on a second point?

14 THE COURT: Sure.

15 MS. GROSS: Yesterday the Court reaffirmed its
16 denial of the defendant's motion in limine seeking to include
17 testimony by Officer Burbbridge that he recognized Plaintiff
18 Marshall from a previous encounter. The court referred
19 defense counsel to United States against Scott, a slip opinion
20 10-39-78, recently decided by the Second Circuit. If the
21 Court could just note our objection that this is a criminal --
22 the Scott case is a criminal case where the defendant's
23 liberty was at stake, and this is a civil case, where liberty
24 is not at stake but monetary damages are. We believe Scott
25 distinguishable, and we note our objection.

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1 THE COURT: Yes, I'm aware of it. As a matter of
2 fact, I made my ruling before the case was handed down.

3 MS. GROSS: That's right, Your Honor. Thank you.

4 THE COURT: Anything further?

5 MS. GROSS: No, Your Honor.

6 THE COURT: So there will be no reference to the
7 reason for the dismissal in the opening; and if you can come
8 up with some case or brief, I'll be happy to hear it so we can
9 introduce it during the course of the trial. Thus far, I have
10 nothing.

11 MS. GROSS: Thank you, Your Honor.

12 MR. NORINSBERG: Your Honor, just to be clear,
13 because I don't want to run afoul of the court's ruling. To
14 the extent that I'm giving my opening statement and one of the
15 elements is favorable termination, I mean, I will be
16 specifically referring to the fact that the case was
17 dismissed. I'm not going to get into the grounds until the
18 court makes that ruling.

19 THE COURT: Don't say anything about favorable or
20 unfavorable. Just say it was dismissed.

21 MR. NORINSBERG: Okay.

22 THE COURT: We'll take a moment, and then we'll
23 bring in the jury.

24 (Whereupon, a break was taken.)

25 THE COURT: I've read the Cantolino case. It does

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1 not support the defendant's view, but I'll receive briefs on
2 the point.

3 MS. SANDS: Your Honor, just one question.

4 THE COURT: The jury's coming in.

5 (The jury entered.)

6 THE COURT: Please be seated.

7 Good morning everybody.

8 THE JURY: Good morning.

9 THE COURT: Nice to see you all. We appreciate the
10 service you're giving to the justice system.

11 We'll proceed generally as follows. You'll start at
12 10:00. And do try to be here on time because if anybody is
13 late, we have to hold everybody up. The Court and the
14 attorneys meet earlier, at 9:30, so that the case can go more
15 smoothly. We'll generally continue to about 4:30, but we may
16 go a little earlier or later, depending on how the witnesses
17 break. We'll take a break in the morning, at least one break,
18 and a break or two in the afternoon, and we'll serve lunch
19 somewhere between 12:00 and 1:00. Today it will be at 1:00
20 because I have a meeting. Ms. Lowe will arrange to get lunch
21 for you, and you'll eat it in the jury room at the
22 government's expense.

23 Is there anybody who has any problems with that
24 schedule?

25 Has anything occurred to any of you that would make

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1 you less desirable as a juror in this case that you can think
2 of?

3 All right. We'll proceed.

4 Is the jury satisfactory, Counsel.

5 MR. NORINSBERG: Satisfactory to plaintiff.

6 MS. GROSS: Satisfactory to defendants.

7 THE COURT: Swear the jury, please.

8 (The jury was sworn.)

9 THE COURT: Now we'll proceed first with openings.

10 The attorneys for the plaintiff have the main burdens here --
11 I'll explain that at the end of the trial -- because they're
12 seeking something from the Court. So they'll open and tell
13 you what they think the evidence will show, give you an
14 overview. Then the defense counsel will do the same from the
15 defendant's point of view. Then you'll hear witnesses called,
16 first by the plaintiff, cross-examined by the defense counsel.
17 When all of the witnesses for the plaintiff are in, the
18 defendant may offer witnesses, and there may be some rebuttal.
19 When we hear all the witnesses and see all the documents and
20 anything else that's going to be admitted, then we'll have
21 summations. The attorneys will try to analyze the evidence
22 for you and explain why you should find in their favor. Then
23 I'll give you a charge. I'll tell you what the law is. And
24 you'll go into the jury room with all of the exhibits and any
25 of the testimony you want to hear and try to decide the case.

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1 You can take notes during the trial. Ms. Lowe will
2 arrange for paper and pencils.

3 If you have any questions, see Ms. Lowe. She will
4 take them in writing, if you want me to see them or present
5 them to the attorneys. Then she'll give them to me. Do you
6 understand?

7 THE JURY: Yes.

8 THE COURT: Any questions?

9 THE JURY: No.

10 THE COURT: Proceed with the openings, please.

11 MR. NORINSBERG: Thank you, Your Honor.

12 Good morning, ladies and gentlemen.

13 THE JURY: Good morning.

14 MR. NORINSBERG: The case that you're about to hear
15 is an important case. It's a case about a man who was falsely
16 imprisoned for four and a half months at Rikers Island. It's
17 about a man who had to fight felony charges for over a year
18 until finally all of the charges that were brought against him
19 were dismissed. And it's about the two police officers who
20 brought the false charges against him, Officer Burbridge and
21 Officer Randall, the defendants in this case. And it's about
22 Mr. Marshall, the plaintiff, the man that they did this to.

23 Now, how did this all happen? It goes back to the
24 night of May 15th, 2008. That night started out like any
25 other night for Joshua Marshall. He had not been feeling good

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1 that day. He was under the weather and coming down with some
2 type of cold. He was trying to rest it off. But at night,
3 when he was trying to fall asleep, he could not get to sleep.
4 So something where he just needed to get some medication, some
5 cold medication, free up his breathing and allow him to go to
6 bed.

7 So sometime after midnight, Mr. Marshall got out of
8 his bed, went to the store. There were two local bodegas open
9 24 hours just within two blocks or so of where he was staying
10 at the time. He knew about them, so he went to these stores,
11 the plan being go to one store, get something light for the
12 stomach, some soup and ginger ale, and then he was going to go
13 to the second store to pick up some cold medicine.

14 So he made it to the first store about out a
15 problem. Got what he needed. And he went to the second
16 store, and he ran into somebody that he knew from the
17 neighborhood. Not a close friend of his by any stretch,
18 but -- he didn't even know the guy's name, but he knew his
19 nickname in the neighborhood was Sip. They exchanged
20 pleasantries. They were walking back in the same general
21 direction when they left the second store.

22 So they leave the store together. They're talking.
23 They part ways right around the intersection of Park Street
24 and Broadway in Brooklyn. Mr. Marshall makes a right as he's
25 heading out Park Street. Mr. Meade -- Demetrios Meade is his

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1 name -- keeps going straight. But all of a sudden, within a
2 few seconds -- Mr. Meade, instead of just continuing to walk
3 in the direction he's going, all of a sudden he walks back to
4 where Mr. Marshall is going and says the police are coming.
5 So Mr. Marshall is like, well, so the police are coming. You
6 know what's the big deal? I'm just carrying cold medicine and
7 soup. So I'm going to continue walking on my way.

8 But Mr. Meade -- Mr. Marshall had nothing to hide,
9 but as it turns out, Mr. Meade did have something to hide. He
10 had a weapon on him. And what he decided to do -- he kind of
11 panicked when he saw the police coming. They were coming down
12 Park Street.

13 Now, Park Street, the traffic is actually coming in
14 this direction. It's a one-way street, and the police are
15 going the wrong way in the one-way street. So Mr. Meade sees
16 this, panics, and he kind of positions himself really close to
17 where Mr. Marshall is, and he throws his gun out into the
18 street, hoping that maybe the police wouldn't quite see where
19 the gun came from if they stop him.

20 So he does that, and it actually works very well,
21 because the police don't see where the gun came from. They
22 get out of the car, and the first thing that they do with
23 their guns drawn is they throw these men up against the wall,
24 both of them, and they say, whose gun is it? Whose gun is it?
25 Tell us whose gun it is.

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1 And Mr. Marshall is there, and he's just thinking
2 this guy better do the right thing. He's got to own it. This
3 is his problem. It's not my problem. He's gotta own it. But
4 Mr. Meade is just kind of standing there silently, not saying
5 a word. So Mr. Marshall says finally, it's his gun. You know
6 it's his gun. It's not my gun.

7 So at that point, both of these men are handcuffed
8 and standing there, and the police decide to have a little
9 conference amongst themselves. They have a conference for a
10 few minutes, they're talking about it, and they make a few
11 decisions.

12 One decision they make is that Salim Randall is
13 going to be the arresting officer that night. Now, this
14 officer, you're going to learn, will later testify that to
15 this day, he doesn't know why he's the arresting officer. But
16 they decide he's going to be the arresting officer, and they
17 decide they're going to go and take one these men into
18 custody. And that man turns out to be Mr. Marshall.

19 Mr. Marshall is then placed into the police car, and
20 he's going towards their precinct. And obviously, he just --
21 he's thinking to himself, just 20 minutes ago, I'm lying in my
22 bed. If I didn't go out to get this cold medicine, I wouldn't
23 be in this spot. I don't know what they think I'm doing.
24 This is wrong. He's angry and upset. But on the other hand,
25 he believes this is all going to get straightened out. He's

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1 imagining he goes to the precinct; obviously, after they
2 question him for a while, they're going to figure out it's not
3 his gun, and this problem is going to go away.

4 Well, it turns out things didn't get straightened
5 out. Things got a lot worse for him. You're going to learn,
6 ladies and gentlemen, shortly after this arrest, the
7 defendants in this case, Police Officer Burbridge and Police
8 Officer Randall, met with prosecutors from the Brooklyn
9 district attorney's office, and at that point they had a
10 critical decision to make, the decision being do they simply
11 tell the truth and just admit to the prosecutors that they got
12 there split seconds too late and didn't actually see whose gun
13 it was or just accept the consequences of that, let the chips
14 fall where they may. If that means the case gets thrown out,
15 so be it. Just come clean and tell the prosecutors what
16 actually happened. Or do they come up with a story to try to
17 justify the arrest?

18 The reason we're here today, ladies and gentlemen,
19 is they chose that second path of dishonesty, and they told
20 the prosecutors a story. Wait till you hear the story that
21 they came up with. Remember, out on the street, it's whose
22 gun is it? Whose gun is it? Now, when they meet with the
23 prosecutors, all of the sudden the story is, well, what
24 happened was we were driving down the street, and we politely
25 came up to Mr. Marshall; and we asked him, sir, can we please

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1 have a moment of your time. And as soon as we asked him that
2 question, right in front of us, he took out a gun, out of his
3 waistband and threw it into the street. That was the story
4 they came up with. The proof in this case is going to be that
5 was an outright deliberate fabrication. Absolutely did not
6 happen.

7 And you'll learn, ladies and gentlemen, the next
8 thing is one of the officers appeared in front of the grand
9 jury. Both of them actually testified in front of the grand
10 jury. And you'll learn the arresting officer, Officer
11 Randall, swore under oath that he saw with his own eyes
12 Mr. Marshall remove this gun. It was in his possession.
13 You're going to learn, though, that later on he would admit
14 that, in fact, he never saw the gun in his possession. It was
15 again another outright fabrication to the grand jury.

16 Now, Mr. Marshall has no idea what these police
17 officers are telling the grand jury, but he did what any
18 innocent person would do. He decided that he wanted to
19 volunteer and testify to the grand jury. He didn't have to.
20 He actually volunteered to go in there and tell the grand jury
21 what happened. He figured there's nothing I have to hide.
22 They need to hear from me, from my own words, what happened
23 that night. They'll know. They'll know I'm innocent.

24 Well, he did that. He took a gamble and went in
25 there, again, not knowing what the officers had actually said.

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1 He goes in there, and he says what happened. But he's not
2 aware of the fact that the officers have changed the actual
3 story about what happened that night. So by the time they're
4 done testifying, he gets indicted by the grand jury. Multiple
5 charges of possessing a weapon.

6 Now, in this trial, you as jurors are going to hear
7 things that grand jury never heard. You as jurors are going
8 to see things that grand jury never heard. And you'll
9 understand how it is that all the charges in this case were
10 dismissed.

11 In May of 2009, criminal possession of a weapon in
12 the second degree, dismissed, thrown out. Criminal possession
13 of a weapon in the third degree, dismissed, thrown out.

14 THE COURT: Strike the words "thrown out." They
15 were just dismissed. Nobody threw them anyplace.

16 MR. NORINSBERG: You'll learn that all the charges
17 were dismissed in this case.

18 Now, what we're going to do in this trial is explore
19 what happened and what led up to the dismissal of these
20 charges. And the proof in this case, ladies and gentlemen, is
21 going to be that these officers had massive credibility
22 problems you're going to hear about in this trial.

23 For example, you're going to learn that the
24 arresting officer, while he told one prosecutor that he
25 actually saw Mr. Marshall in possession of the gun, he

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1 actually told another prosecuting attorney that he never saw
2 Mr. Marshall in possession of the gun.

3 You're going to learn that the officers' story has
4 changed over time. They've given at least three different
5 stories about what happened here. In one version of events,
6 they're as far away as 25 feet from where this takes place,
7 where Mr. Marshall has his gun. In another version of events,
8 Officer Burbridge and the car is right next to Mr. Marshall,
9 and Officer Burbridge actually steps out onto the street in
10 front of Mr. Marshall, and that's when he sees the gun thrown.
11 In another version, he didn't step out in the street. He's
12 actually still in the car, but the car's 10 feet away. And
13 that's when he sees this happen. At least three different
14 stories that you're going to learn about, about what they
15 claim.

16 You'll learn, ladies and gentlemen, that part of the
17 story that they came up with, they said right before they saw
18 Mr. Marshall throw this gun, they saw him try to hide behind
19 Mr. Meade. But you'll learn again their stories are
20 completely different. One officer says Mr. Meade stopped and
21 Mr. Marshall kept walking, and that's when he threw the gun.
22 The other officer said, no, what happened, Mr. Marshall walked
23 backwards, that's when he threw the gun. They can't keep
24 their story straight.

25 But you'll learn it's not just their changing

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1 stories that raises doubts about their credibility. The proof
2 in this case will also be that the arrest paperwork simply
3 does not match what they claim happened that day. For
4 example, you're going to learn that even though both officers
5 have claimed that they actually saw Mr. Marshall pull out a
6 gun with their own eyes and throw it, there's not one word of
7 that in any of the arrest paperwork. Nothing in the arrest
8 report about that. Nothing in the complaint report about
9 that. Nothing in the officer's memo book entry.

10 Now, you'll learn that the arresting officer was
11 asked about this, the one who filled out the paperwork. Why
12 is it that -- if this happened, why is it not in your report?
13 You'll learn that this officer admitted he has no explanation
14 whatsoever for why he didn't put those things. He admitted
15 they're very important facts, but he says he has no idea why
16 they're not in his report.

17 Apart from the changing stories and the police
18 paperwork, you'll learn also that the most telling thing in
19 this case is the complete lack of concrete evidence connecting
20 Mr. Marshall to this gun. The proof in this case will be,
21 ladies and gentlemen, there's not one shred of physical
22 evidence connecting him to this gun. No physical evidence, no
23 forensic evidence, no DNA evidence, nothing.

24 In fact, you're going to learn that the claim
25 they're talking about, that he pulled out his gun, you would

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1 expect that you might see fingerprints on that gun. No
2 fingerprints found on the barrel of the gun. No fingerprints
3 found on the cartridge for the bullets. No fingerprints found
4 on the gun grip. Nowhere.

5 And you'll learn, ladies and gentlemen, that the
6 officer, Officer Randall, the arresting officer, actually
7 himself -- you'd think he'd be interested in getting
8 fingerprints, but you'll learn that he actually filled out a
9 police report where he specifically checked off the box to not
10 check for fingerprints. But even though he did it, they
11 checked it anyway. Nothing showed up. No DNA evidence on the
12 grip, no DNA evidence on the barrel, no DNA evidence anywhere
13 on that gun.

14 Now, I expect during this trial, you'll hear the
15 defense call some witnesses from the City of New York, who
16 will come in, and I expect the proof to be that they'll give
17 you explanations and excuses for why there's no DNA evidence,
18 why there's no fingerprint evidence on this gun. But the
19 bottom line is what the proof in this case will show there is
20 no forensic evidence in this case connecting this man to this
21 gun because he did not own this gun. He didn't possess it, he
22 didn't own it and he never touched it. It was not his gun.
23 That's what the proof in this case is going to show, ladies
24 and gentlemen.

25 So when you hear all of this evidence, when you hear

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1 about the police officers' different versions of events, the
2 arrest reports that don't have what they claim to have
3 happened and the complete lack of DNA and forensic evidence
4 and fingerprint evidence, you'll start to understand why the
5 charges were dismissed want.

6 Now, what we're going to do in this case, the way I
7 see our job is to simply present to you the evidence, present
8 it to you and you decide the case. The way we're going to do
9 it, we're going to get right down to business this morning.
10 We're not going to waste any time. I'm immediately calling
11 the arresting officer, and I'm also calling right after that
12 Officer Burbridge. So you'll get to hear it. And what we're
13 going to do is work through the evidence piece by piece as if
14 you're looking at it on a video frame, going back to May 15th,
15 2008, to see what makes sense and what doesn't make sense.

16 And if any of you might have an expectation, if you
17 think that perhaps after we do this and we cross-examine the
18 officers we're going to have a dramatic moment in court where
19 they admit that they haven't told the truth, think again.
20 That will never happen. These officers, I expect, will
21 testify and give the same false claims that they told the
22 prosecutor and the grand jury. But it's up to you as the
23 jurors in this case, having much more evidence available than
24 anyone's who has looked at the case before, to decide whether
25 or not those claims are true.

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1 Now, one last thing I expect also. I expect that
2 you're going to hear from a third police officer who was on
3 the scene, an Officer Fox, and you're going to find there are
4 credibility issues with this officer as well. You'll learn
5 that this officer never testified before. Didn't testify in
6 the grand jury. Didn't testify during the civil lawsuit.
7 This will be the first time he's going to come and tell his
8 version of events, which I suspect he's going to say the same
9 thing the other two officers said, that he saw the same thing
10 they saw. But again, you are going to be the ultimate judges,
11 and you'll decide whether or not that testimony is credible.

12 Ladies and gentlemen, the bottom line is this. We
13 brought this lawsuit. It's been four years now. We brought
14 this lawsuit because this man never should've been arrested,
15 much less prosecuted. And the proof in this case will that
16 these defendants falsely accused him of a crime he didn't
17 commit and then deliberately lied to the prosecutors to make
18 sure that this case went forward rather than simply own up to
19 the fact that they didn't know who actually threw the gun.
20 And the bottom line is this man wound up spending four and a
21 half months in jail, the entire summer of 2008 in jail as a
22 result of these charges before finally, later the following
23 year the charges were dismissed.

24 So I ask you now to simply listen carefully. This
25 is going to require the highest level of concentration as

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1 jurors, the closest detail to attention, thinking constantly
2 as you're going through this process with us, thinking and
3 challenging assumptions and looking closely at the evidence.
4 If you do that and if you honor the pledges that all of you
5 made in jury selection yesterday, you will get the right
6 result, and that is to hold these two defendants responsible
7 for what they did to Joshua Marshall.

8 Thank you.

9 THE COURT: Thank you.

10 Defendant.

11 MS. GROSS: Despite what you just heard from
12 plaintiff's counsel, ladies and gentlemen, this is a very
13 simple case. Three police officers were on patrol. They saw
14 a man walking down a Brooklyn street on May 15th, 2008. They
15 approached the man. They saw the man reach into his
16 waistband, pull out a gun, pitch the gun to the street. They
17 recovered the gun, and they arrested the man. That man was
18 Joshua Marshall. That's the case.

19 Good morning, ladies and gentlemen. My name is
20 Felicia Gross. I, along with co-counsel, Johana Castro, will
21 be representing New York police officers Salim Randall and
22 Michael Burbridge.

23 On May 15th, 2008, Officers Randall and Burbridge
24 were out on routine patrol. They were assigned to Brooklyn
25 North anti-crime unit, a unit of the New York City Police

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1 Department that specializes in patrolling high-crime areas.

2 They along with a third officer, Kiernan Fox, were
3 out on routine patrol, working night patrol.

4 May 15th was a spring night. It was a week night, a
5 Wednesday night.

6 A little bit after midnight on Wednesday night,
7 12:40 a.m., they see two men walking down Broadway, which is
8 on the border of Bushwick and Bedford-Stuyvesant neighborhoods
9 in Brooklyn. The street was deserted at that hour, and the
10 officers' attention was drawn to the men, given the lateness
11 of the hour, the fact that they were near a street corner,
12 late at night in a high-crime area.

13 One of those men was Joshua Marshall. The other
14 man's name was Demetrios Meade. Mr. Marshall has in the past
15 referred to Mr. Meade as his associate; and for the duration
16 of the trial, I'll refer to him as his associate as well.

17 (Continued on the next page.)
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1 MS. GROSS: You will hear that as the officers
2 approached plaintiff, plaintiff's eyes became wide. He became
3 startled. He sprang into action. He motioned to his friend
4 to come closer. He turned the corner down the street, and the
5 two of them sped up down the street in opposite direction from
6 the police officers.

7 Upon seeing those actions, the officers decided to
8 approach. They pulled up alongside the two men and asked for
9 a moment of their time. Their intention was to speak with
10 them, ask them what they were doing at that time of night and
11 where they were going, an approach they do routinely on their
12 patrol.

13 Here's what they had: Two men, late at night, high
14 crime area, near the street corner, and they had just made
15 furtive movements. Plaintiff just looked frightened, sped off
16 in the opposite direction from the officers.

17 You'll hear that as the officers approached,
18 plaintiff stepped behind his associate, reached into his
19 waistband, pulled out a gun and made a pitching motion towards
20 the street. Clink. That's what the officers will testify
21 they heard next. They knew instantly Joshua Marshall had just
22 thrown that gun into the street. Clink. You'll hear each of
23 them testify there was a high-pitched clink noise of a gun.
24 The stainless steel on pavement is unmistakable. There was no
25 confusing who had thrown the gun, no mistake, no confusion.

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1 No doubt in their mind, and at no time did they say, "Whose
2 gun was it? Whose gun was it?" That's not what happened
3 here.

4 Once the gun had been thrown into the street,
5 Officer Randall arrested Joshua Marshall. Officer Burbridge
6 retrieved the gun from the street. The gun was a fully-loaded
7 .38 caliber Smith and Wesson revolver, nine inches in length.

8 Officer Randall briefly speak with plaintiff's
9 associate, wrote down his information and let him go. There
10 was no doubt in any of the officers minds as to which man had
11 thrown the gun: Joshua Marshall.

12 Ladies and gentlemen, you have heard that next, the
13 grand jury indicted Mr. Marshall. Plaintiff had the
14 opportunity to talk to the grand jury, and he told them his
15 version of events and the grand jury indicted him. You've
16 also hear that the case against him was dismissed. Just
17 because the case against him was dismissed doesn't mean that
18 he wasn't the one who threw the gun into the street.

19 Finally, ladies and gentlemen, you will hear from
20 two forensic witnesses. They're going to testify as to the
21 forensic evidence that they've collected in this case. First,
22 you'll hear from officer Sand. He's a member of the New York
23 Police Department Evidence Collection Team. He performed a
24 fingerprint test on the gun and he swabbed the gun for DNA
25 evidence to send to the lab, which he did.

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1 Next, you'll hear from a criminologist in the City
2 Medical Examiner's Office, Nana Lynn Smith. She'll tell you
3 that she examined and analyzed the DNA swabs that she received
4 from the evidence collection team. Both witnesses will tell
5 you there was simply not enough forensic material on the gun,
6 not enough fingerprints, not enough DNA on the gun to make a
7 meaningful match.

8 You have heard plaintiff's counsel say that
9 plaintiff's fingerprints weren't on the gun. It's misleading.
10 No one's fingerprints were found on the gun because there
11 simply wasn't enough material from the gun to meaningfully
12 test.

13 I know a number of you must watch the television
14 programs like CI and Law and Order, so you may be under the
15 misimpression that --

16 MR. NORINSBERG: Objection.

17 MS. GROSS: You may be under the misimpression
18 that --

19 THE COURT: Could you repeat? Keep your voice up,
20 please. Keep your voice up.

21 MS. GROSS: You may be under the misimpression that
22 many cases --

23 MR. NORINSBERG: Objection. There is going to be
24 evidence in the case --

25 THE COURT: Save that for your summation, please.

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1 MS. GROSS: Very well, Your Honor.

2 I will mention that because there was not enough
3 DNA evidence on the gun, for you, what that means is that the
4 forensic evidence in this case doesn't help you decide whose
5 gun it was, doesn't tell you whether it was Marshall's or
6 whether it was not. For that, you're going to have to rely on
7 the credible testimony you hear over the next few days.

8 Ladies and gentlemen, that credible testimony will
9 show that it was Marshall's gun. Marshall possessed the gun.
10 Marshall pulled it out of his waistband. Marshall pitched it
11 into the street. And the officers acted reasonably in
12 arresting Joshua Marshall.

13 Ladies and gentlemen, after evaluation of all the
14 evidence in this case, we will ask to you to return a verdict
15 in favor of officers Burbidge and Randall. Thank you.

16 THE COURT: Thank you.

17 Call your first witness, please.

18 MR. NORINSBERG: Plaintiff calls Defendant Salim
19 Randall to the stand.

20 (Witness sworn.)

21 THE CLERK: Please state and spell your name for the
22 court reporter.

23 THE WITNESS: My name is Salim Randall, S-A-L-I-M,
24 as in "Mary." Last name IS Randall, R-A-N-D-A-L-L.

25 THE COURT: Thank you. Take your seat, please.

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DIRECT - OFFICER RANDALL

1 BY MR. NORINSBERG:

2 Q Good morning, Officer Randall.

3 A Good morning.

4 Q You were served with a subpoena to be here, is that
5 correct?

6 A Yes.

7 Q And up are one of the named defendants in this case,
8 correct?

9 A Yes.

10 Q You were the officer who actually arrested Joshua
11 Marshall on May 15th, 2008, correct?

12 A Yes.

13 Q Now, you have previously given sworn testimony relating
14 to this arrest, true?

15 A That is true.

16 Q You gave testimony at a grand jury proceeding, correct?

17 A Yes.

18 Q You also testified at a deposition in this lawsuit, true?

19 A Yes.

20 Q And before coming here today, you made sure to review
21 your testimony from those two proceedings, correct?

22 A Yes.

23 Q Now, you have been employed by the NYPD for approximately
24 nine years, is that true?

25 A That's true.

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DIRECT - OFFICER RANDALL

1 Q And on May 15th, 2008, you were a police officer,
2 correct?

3 A Yes.

4 Q You were working as part of the Brooklyn North Anticrime
5 Unit, correct?

6 A Yes.

7 Q And you had been with Brooklyn North Anticrime for
8 approximately five months at that time, true?

9 A That is true.

10 Q Your duties and responsibilities in Anticrime were to do
11 patrol, right?

12 A Yes.

13 Q You were looking for violent crime, right?

14 A Yes.

15 Q And violent crime could include robbery or assault,
16 things of that nature, right?

17 A That is correct.

18 Q And that particular night, you had two partners, true?

19 A Yes.

20 Q One of those partners was Officer Burbridge, right?

21 A Yes.

22 Q The other was Officer Fox, correct?

23 A Yes.

24 Q And you were inside of an unmarked police vehicle,
25 driving around, doing patrol, right?

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DIRECT - OFFICER RANDALL

1 A That is correct.

2 Q Officer Fox was actually the driver of that vehicle,
3 right?

4 A Yes.

5 Q Officer Burbridge was in the front passenger seat of that
6 vehicle, right?

7 A Yes.

8 Q And you were actually in the back seat behind the driver,
9 correct?

10 A Correct.

11 Q Now, there came a time where you stopped two individuals
12 on Park Street, true?

13 A True.

14 Q And one of the individuals was Joshua Marshall, correct?

15 A That is correct.

16 Q And you learned the name of the other individual was Mr.
17 Demetrius Meade, right?

18 A Yes.

19 Q And you stopped Mr. Marshall on Broadway and Park Street
20 in Brooklyn, is that correct?

21 A Yes.

22 (Pause in proceedings.)

23 BY MR. NORINSBERG:

24 Q You actually stopped them at the corner of Park Street
25 and Broadway, correct?

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DIRECT - OFFICER RANDALL

1 A A little bit in the block, not exactly on the corner.

2 Q Referring to your deposition, page ten, line 20,
3 question, "Where on Broadway and Park Street did the stop of
4 Mr. Marshall take place?"

5 Answer: "The corner."

6 Do you recall being asked that question and giving
7 that answer at your deposition?

8 A It was near the corner.

9 Q Do you recall being asked that question and giving that
10 answer at your deposition?

11 A No.

12 Q Will you agree that you testified at your deposition the
13 stop was actually at the corner?

14 A No, I don't agree with that.

15 Q So the testimony that I just read is incorrect?

16 A Yes, it is. It was near the corner.

17 Q Now, the police vehicle was located on Broadway when you
18 first saw Mr. Marshall, right?

19 A Yes.

20 Q You were actually at the intersection when you first saw
21 Mr. Marshall, true?

22 A Yes.

23 Q And the police vehicle was actually stopped at that
24 traffic light at that intersection, right?

25 A Yes.

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DIRECT - OFFICER RANDALL

1 Q And you're very familiar with this intersection, right,
2 Officer Randall?

3 A No.

4 Q You've been there over hundreds of times, haven't you?

5 A I've driven past it.

6 Q Referring to your deposition, page 122, line ten,
7 question, "How many times have you been to Park Street and
8 Broadway in your career?"

9 Answer: "Multiple."

10 Line 15, question, "Would it be over one hundred
11 times?"

12 Answer: "Yes."

13 Do you recall being asked that question and giving
14 that answer --

15 A Yes, I do.

16 Q -- at your deposition?

17 A Yes.

18 Q So you were very familiar with this particular
19 intersection, true?

20 A What I'm trying to say is, even though I've been by it a
21 hundred times, I never really paid much attention to it, so
22 I'm not very familiar with it.

23 Q All right. But you acknowledged at your deposition
24 you've been past it over a hundred times, right?

25 A That's correct?

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DIRECT - OFFICER RANDALL

1 Q So when we're talking about something took place on the
2 corner, somewhere off the corner, that's something you would
3 be familiar with, right?

4 A Yes.

5 Q Now, at some point, Officer Burbridge suggested that you
6 stop Mr. Marshall, true?

7 MS. GROSS: Objection. Objection, Your Honor. That
8 question is the subject of an in limine ruling.

9 THE COURT: A what?

10 MS. GROSS: And in limine ruling.

11 THE COURT: Repeat the question, please.

12 (Record read by the reporter.)

13 THE COURT: Overruled.

14 A That's true.

15 BY MR. NORINSBERG:

16 Q And prior to Officer Burbridge suggesting that you make
17 this stop, Mr. Marshall had not done anything suspicious in
18 your mind, true?

19 A I'm sorry. Repeat that?

20 Q Prior to Officer Burbridge's statement that he wanted to
21 make this stop, Mr. Marshall had not done anything suspicious,
22 true?

23 A That's true.

24 Q He hadn't made any type of furtive move, correct?

25 A Up until that point, no.

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DIRECT - OFFICER RANDALL

1 Q Now, you had actually seen Mr. Marshall on the other side
2 of Broadway, as he was walking towards the police vehicle,
3 right?

4 A True.

5 Q And your best approximation is -- he was approximately
6 one hundred to 150 feet away from you when you first observed
7 him, correct?

8 A About a hundred feet.

9 Q Referring to your deposition, page 121, line 22,
10 question: "Your best approximation was they were one hundred
11 to 150 feet away, is that correct?"

12 Answer: "Yes."

13 Do you recall being asked that question and giving
14 that answer at your deposition?

15 A Yes.

16 Q So according to your deposition testimony, Mr. Marshall
17 may have been approximately as far away as 150 feet when you
18 first saw him, true?

19 A True.

20 Q And you had your eyes on Mr. Marshall the whole time,
21 from the time you first saw him 'til the time he got to the
22 corner of Park and Broadway, true?

23 A True.

24 Q You never took your eyes off him during that time, right?

25 A No.

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DIRECT - OFFICER RANDALL

1 Q Would you agree during that entire time, during that
2 hundred to 150 feet when Mr. Marshall is walking towards you,
3 that you never saw him do any type of furtive movement at all?

4 A I'm sorry. Repeat that question?

5 Q Let's step back for a second. You're familiar with
6 what's known as furtive movements, right?

7 A Yes.

8 Q Furtive movements would indicate that someone is nervous
9 or trying to hide something, right?

10 A Yes.

11 Q And can you please tell the jury, did Mr. Marshall make
12 any type of furtive movements prior to Officer Burbridge's
13 decision to stop him?

14 MS. GROSS: Objection, Your Honor. Objection, Your
15 Honor.

16 THE COURT: Sustained.

17 Rephrase the question.

18 BY MR. NORINSBERG:

19 Q Can you tell the members of the jury, during that 100 to
20 150 feet when you had him under view, did Mr. Marshall make
21 any furtive movements at all?

22 A He did make furtive movements. Yes, he did.

23 Q Referring to your deposition, page 41, line 25, question,
24 "Prior to" --

25 MS. GROSS: Objection, Your Honor. Objection, Your

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DIRECT - OFFICER RANDALL

1 Honor. The testimony he's about to read impinges on the
2 ruling the Court made previously during the motions in limine.

3 MR. NORINSBERG: The question doesn't get -- these
4 contents are all --

5 THE COURT: Let me hear the testimony. Read it.

6 BY MR. NORINSBERG:

7 Q Question: "Prior to the time that Officer Burbridge made
8 that statement, did Mr. Marshall make any type of furtive
9 movements?"

10 Answer: "No."

11 Do you recall being --

12 MS. GROSS: Objection, Your Honor.

13 THE COURT: Overruled.

14 MS. GROSS: May I have a sidebar, Your Honor?

15 THE COURT: What?

16 MS. GROSS: May I have a sidebar, Your Honor?

17 THE COURT: You may not.

18 MS. CASTRO: We just ask that he finish reading --

19 THE COURT: You may not.

20 Read the other portion, please, that counsel has
21 asked for.

22 BY MR. NORINSBERG:

23 Q Let's see, referring to the -- let me read the whole
24 thing. Question: "Prior to that statement by Officer
25 Burbridge, had Mr. Marshall made any type of furtive

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DIRECT - OFFICER RANDALL

1 movements?"

2 MS. GROSS: Objection.

3 THE COURT: Overruled.

4 BY MR. NORINSBERG:

5 Q Answer: "No. He made furtive movements afterwards."

6 Question: "Prior to the time that Officer Burbridge
7 made that statement, did Mr. Marshall make any type of furtive
8 movement?"

9 MS. GROSS: Objection.

10 BY MR. NORINSBERG:

11 Q Answer: "No."

12 THE COURT: Overruled.

13 BY MR. NORINSBERG:

14 Q Would it be fair to say that before Officer Burbridge's
15 statement, you, yourself, felt that you didn't have grounds to
16 stop Mr. Marshall?

17 A That's true.

18 Q In fact, you felt that you didn't have probable cause to
19 stop him, right?

20 A You don't need probable cause to stop someone.

21 Q Referring to your deposition --

22 A (Nods head affirmatively.)

23 Q -- Page 42, line 22, question: "Under what circumstances
24 can police officers make a stop, as far as you know?"

25 Answer: "As far as I know, you need probable cause

A994

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DIRECT - OFFICER RANDALL

1 to make a stop."

2 Do you recall giving that testimony, Officer?

3 A That is incorrect.

4 Q So again, the testimony that I've just quoted from your
5 deposition is incorrect? Is that what you're telling us?

6 A What I'm trying to say is, you don't need probably
7 cause --

8 Q The answer is yes or no. Is that what you're telling us?

9 A What's the question?

10 Q That your testimony, once again, that I have quoted from
11 is incorrect?

12 A That's true.

13 Q Will you will agree at your deposition, you were under
14 oath, correct?

15 A I made a mistake.

16 Q Now, when you saw Mr. Marshall walking, did you say
17 anything to him?

18 A No.

19 Q Did you say anything to your fellow officers about
20 Mr. Marshall?

21 A No.

22 Q Did you ever say to Mr. Marshall that he looked like he
23 was acting suspicious?

24 A No.

25 Q Did you ever say to Mr. Marshall he looked like he was

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DIRECT - OFFICER RANDALL

1 nervous?

2 A No.

3 Q Did you ever say that, "Hey, I think we ought to stop
4 this guy?"

5 A I didn't say that, no.

6 Q And when Officer Burbridge suggested to you that he
7 should stop him, you didn't say anything in response, did you?

8 A No.

9 Q In fact, you didn't ask Officer Burbridge any questions,
10 right?

11 A No.

12 Q Now, the vehicle that you were in made a right turn onto
13 Park Street, is that correct?

14 A Incorrect. Made a left turn.

15 Q Did you not go down a one-way street from Broadway?

16 A That is correct.

17 Q It is your testimony you actually turned left?

18 A That is correct.

19 Q Would you agree that it took one second or less from the
20 time Mr. Burbridge made the statement to the time when you
21 actually turned onto Park Street?

22 A That's correct.

23 Q And you would agree that Park Street is a one-way street,
24 right?

25 A Yes.

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DIRECT - OFFICER RANDALL

1 Q Traffic flows in opposite direction of the way you had
2 turned your vehicle into the street, correct?

3 A That is correct.

4 Q So the police vehicle is going one way, going the wrong
5 way down a one-way street, right?

6 A Yes.

7 Q Would you also agree that it was under three seconds from
8 the time of the turn until when Mr. Burbridge first spoke to
9 Mr. Marshall?

10 A Yes.

11 Q And you had previously testified that what happened was
12 is that Mister -- that Officer Burbridge approached Mr.
13 Marshall and asked him whether he could please have a minute
14 of his time, is that correct?

15 A Something to that effect, yes.

16 Q And that is very polite and respectful when he did that,
17 right?

18 A Yes.

19 Q So he rolled up to him and said, sir, may I please have a
20 moment of your time?

21 A That's correct.

22 Q That's correct?

23 A Yes, sir.

24 Q And then it's your testimony that at that moment in time,
25 Mr. Marshall stepped backwards, right?

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DIRECT - OFFICER RANDALL

1 A (Pausing.) Yes.

2 Q You were hesitating a little when you answered that. Do
3 you not remember, Officer?

4 A It was a little of a lateral and a backwards step. I
5 could demonstrate, if you want.

6 Q Did Mr. Marshall take a step behind the other individual?
7 Yes, he did or no, he didn't?

8 A Sure. Yes.

9 Q He took a -- so he took a step -- if he's here on the
10 street, he took a step backwards, correct?

11 A Wrong.

12 Q Referring to your deposition, page 54, line 17, question,
13 "You testified Mr. Marshall took a step backwards when the --
14 behind the other individual, is that correct?"

15 A That is correct.

16 Q Answer: "Yes."

17 Do you recall testifying at your deposition that, in
18 fact, you saw Mr. Marshall take a step backwards?

19 A He took a step backwards, but he was walking the opposite
20 way. He was walking to the left.

21 Q He took a step behind the other individual, according to
22 your testimony, right?

23 A Right. But what you just displayed wasn't how it
24 happened. That's why I said no. The street wasn't in front
25 of him.

A998

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DIRECT - OFFICER RANDALL

1 Q Would you agree he took a step behind the other
2 individual?

3 A Yes.

4 Q So you would agree that's different than having the other
5 individual stop and Mr. Marshall continues walking in front of
6 you him. Would you agree that's difference?

7 A Yes.

8 Q So your version is behind, but you're aware of the fact
9 that Officer Burbridge saw him actually walking ahead of the
10 other individual. You're aware of that, right?

11 A I don't know if that's right or not.

12 Q Now, this is when you claim that you saw Mr. Marshall
13 remove his gun, is that correct?

14 A That's correct.

15 Q And can you tell the members of the jury before he
16 actually moved removed his gun, how many steps backwards did
17 Mr. Marshall actually take?

18 A One.

19 Q Referring to your deposition, page 37, line 13, question,
20 "Was it one step or more than one step?"

21 Answer: "I don't remember."

22 Page 54, line 21, question: "How many steps back
23 did he take?"

24 Answer: "I don't remember."

25 Do you recall giving that testimony at your

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DIRECT - OFFICER RANDALL

1 deposition?

2 A Yes.

3 Q So at your deposition, you couldn't remember how many
4 steps back Mr. Marshall supposedly took, true?

5 A That's right.

6 Q But you're now here today, you told us he only took one
7 step, is that correct?

8 A Yes.

9 Q Is your memory better here today than it was a year ago
10 when you gave that sworn testimony?

11 A I've thought about it a lot since then, yeah.

12 Q So this case has been on your mind a lot, is that right?

13 A Absolutely.

14 Q You testified over a year ago -- about a year ago, is
15 that right?

16 A Yes.

17 Q When did you first realize that it was -- you actually
18 remembered it was only one step and not several steps back?

19 A Somewhere in between that year ago and today. I don't
20 know exactly.

21 Q Now, was the step straight back or was it diagonal or in
22 some other direction?

23 A It was a step backwards and a little closer. So it was
24 like a step back and a little diagonal at the same time.

25 Q Referring to your deposition, page 37, line 16, "Was the

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DIRECT - OFFICER RANDALL

1 question, question, "Was the step straight back, was it
2 diagonal or in some other direction?"

3 Answer: "I don't remember those details. He stepped
4 behind him, where the other individual was positioned in front
5 of him."

6 Do you recall being asked that question and giving
7 that answer at your deposition?

8 A Yes.

9 Q So once again, at your deposition, you did not remember
10 those specific details, correct?

11 A That is correct.

12 Q Is your memory better here today, now?

13 A I just said that, yes.

14 Q Did Mr. Marshall lead with his right leg or his left leg?

15 A I don't know. I don't remember.

16 Q But you do remember that the other individual, Mr. Meade,
17 was in front of him, right?

18 A At the time he pulled the gun, yes.

19 Q And that's when you saw him pull the gun, right?

20 A That's correct.

21 Q And then you charged Mr. Marshall with possession of a
22 firearm, true?

23 A Yes.

24 Q But you never actually saw Mr. Marshall in physical
25 possession of a firearm, did you? Yes or no?

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DIRECT - OFFICER RANDALL

1 A Yes.

2 Q Referring to your deposition, page 58, line 20, question,
3 "You never saw the object in Mr. Marshall's actual physical
4 possession, is that correct?"

5 Answer: "That is correct."

6 Do you recall being asked that question and giving
7 that answer at your deposition?

8 A Yes, I do.

9 Q According to your sworn testimony at the deposition, you
10 never saw Mr. Marshall in actual physical possession of that
11 gun, true? Yes, sir or no, sir? Is that true?

12 A True, with explanation.

13 Q That's what you answered at your deposition. You said
14 that is correct?

15 A Right.

16 Q Now, after this incident, you also testified before the
17 grand jury, correct?

18 A That's correct.

19 Q And when you testified before the grand jury, you
20 understood it was important that you be completely honest and
21 truthful, right?

22 A Yes.

23 Q You knew that your testimony from that grand jury could
24 send this man to jail, right?

25 A Yes.

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DIRECT - OFFICER RANDALL

1 Q You knew that your testimony from that grand jury could
2 send him away for five years, correct?

3 MS. GROSS: Objection.

4 A No.

5 BY MR. NORINSBERG:

6 Q But you knew that he would be facing serious felony
7 charges, right?

8 A Yes.

9 Q Now, when you testified before the grand jury, you told
10 the grand jury that you actually saw Mr. Marshall pull out a
11 firearm from his waistband, is that right?

12 A Yes.

13 Q But in fact, you never actually saw Mr. Marshall remove
14 any object from his waistband, did you? Yes or no?

15 A Yes, I did.

16 Q Referring to your deposition once again, page 33, line
17 six, question: "The object that you saw him pull out of his
18 pants?"

19 Answer: "I didn't see the object as he pulled it
20 out of his pants."

21 Do you recall being asked that question and giving
22 that answer?

23 A Yes, I do.

24 Q So you actually interrupted the question at the
25 deposition and made it clear that, quote, I didn't see the

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DIRECT - OFFICER RANDALL

1 object as he pulled it out of his pants, right?

2 A I didn't interrupt any questions.

3 Q You answered that instead, quote, I didn't see the object
4 as he pulled it out of his pants, right?

5 A Like I said, with an explanation.

6 Q Would you agree --

7 MS. GROSS: Objection. May the witness continue to

8 --

9 THE COURT: Have you finished your answer?

10 THE WITNESS: No.

11 THE COURT: You may finish.

12 THE WITNESS: What I'm trying to say was, I saw him
13 pull the gun out of his pants and throw it in the street, but
14 because he was behind Meade, I couldn't actually see the gun
15 itself.

16 But I saw the motion. I saw him throw the gun. I
17 heard the clink when it hit the ground. I got out the car,
18 looked at the spot and saw the gun. When you put all the
19 pieces of the puzzle together, yes, I saw him pull the gun out
20 and throw it in the street.

21 Q He was behind you? Is that what you're telling us now?

22 A No. I said he was behind Mr. Meade.

23 Q He was behind Mr. Meade and that's why you didn't see
24 him?

25 A Yes. That's why I didn't physically see the gun in his

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DIRECT - OFFICER RANDALL

1 hand. I saw him pull it out.

2 Q You told the grand jury that you personally saw Mr.
3 Marshall remove an object in his waist. True or not true?

4 A That's true.

5 Q But in fact, you didn't see any part of a gun at this
6 moment in time, did you?

7 A At what moment in time?

8 Q When you claimed you saw him remove it?

9 A No. I saw him pull a gun out of his pants.

10 Q Referring to your deposition, page 106, line ten,
11 question: "Did you visually see any part of that object at
12 that moment in time?"

13 Answer: "No."

14 Do you recall being asked that question and giving
15 that answer at your deposition?

16 A Yes, sir. That's correct.

17 Q So according to your deposition testimony, you didn't see
18 any part of the object at that time, true?

19 A As he was pulling it out, I couldn't see it, no.

20 Q Now, as the arresting officer you filled out certain
21 reports in connection with this incident, correct?

22 A That's correct.

23 Q And one of the reports you filled out is an arrest
24 report, true?

25 A Yes.

A1005

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DIRECT - OFFICER RANDALL

1 MR. NORINSBERG: May I approach the witness, Your
2 Honor?

3 THE COURT: You may. You don't have to ask.

4 MR. NORINSBERG: (Nods head affirmatively.)

5 BY MR. NORINSBERG:

6 Q (Approaching.) I would like to you show you what's been
7 marked as Plaintiff's 6 for identification. (Handing.)

8 A (Peruses document.)

9 Q Do you recognize that document?

10 A Yes.

11 Q Do you recognize it as your arrest report?

12 A Yes.

13 Q And you, yourself, actually prepared that arrest report,
14 is that correct?

15 A I might have.

16 Q Referring to your deposition, page 114, line five,
17 question: "Did you prepare this arrest report?"

18 Answer: "Yes."

19 Do you recall giving that testimony?

20 A No.

21 Q Okay. But you agree that at your deposition, you said
22 that you were the one that actually prepared the report, true?

23 A I agree that I at least reviewed it.

24 Q You said you prepared the report, true?

25 A I don't know.

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DIRECT - OFFICER RANDALL

1 Q Referring to your deposition testimony again, line 114 --
2 page 114, line five: "Did you prepare this arrest report?"

3 Answer: "Yes."

4 You didn't say you might have prepared it. You
5 didn't say it's possible you reviewed it. You said you
6 prepared it, true?

7 A Okay. Yes.

8 Q And can you --

9 MR. NORINSBERG: I'd like to offer the arrest report
10 into evidence, Your Honor.

11 THE COURT: Yes. Admitted.

12 MR. NORINSBERG: Yes. I would like to now show a
13 blowup of this exhibit, 6A, same exhibit.

14 Can you see it, Your Honor.

15 THE COURT: I'll move so, I can see it better.

16 Next time, let's try to put it in front of the all
17 the jurors.

18 Can all of you see that?

19 Move it up, so everybody can see.

20 THE COURT: (Sits in the jury box.)

21 THE COURT: All right. Go ahead.

22 BY MR. NORINSBERG:

23 Q Now, you recognize this as a blowup of your same arrest
24 report?

25 A Yes.

A1007

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DIRECT - OFFICER RANDALL

1 Q Can you please tell this jury, did you mention anything
2 on your arrest report about seeing Mr. Marshall reaching into
3 his waistband?

4 A No.

5 Q Now, you also claim you saw Mr. Marshall toss the object,
6 right?

7 A Yes.

8 Q And you told the grand jury you personally observed him
9 throwing the object, right?

10 A Yes.

11 Q Can you tell the members of this jury, did you mention
12 anything on your report about seeing Mr. Marshall toss an
13 object?

14 A No.

15 Q Now, you would agree that those are important facts,
16 aren't they, Officer Randall?

17 A Yes.

18 Q In fact, you would agree they're very important facts?

19 A Yes.

20 Q And yet, none of those very important facts are in your
21 arrest report, are they?

22 A No.

23 Q And the highlighted section we have here is the detailed
24 section of the report, right?

25 A Yes.

A1008

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DIRECT - OFFICER RANDALL

1 Q That gives you a chance to put in the specific details
2 about what led up to the arrest, right?

3 A Yes.

4 Q But you didn't do that, did you?

5 A No.

6 Q Can you please tell this jury why didn't you mention
7 anything about seeing Mr. Marshall reaching into his waistband
8 on your arrest report?

9 A Because on an arrest report like this, we don't write
10 those kind of fine details. We give a general explanation of
11 what happened. And then later on, we talk to the DA, and then
12 we give them the details.

13 Q Referring to your deposition, page 120, line 11,
14 question: "Why didn't you mention that fact on your arrest
15 report?"

16 Answer: "No particular reason."

17 Do you recall giving that testimony in your
18 deposition?

19 A Yes.

20 Q So you didn't mention the explanation you just gave to
21 your jury -- to the jury here, and you never mentioned that in
22 your deposition, did you?

23 A No.

24 Q You said there was, quote, no particular reason, right?

25 A (Nods head affirmatively.) Yes.

A1009

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DIRECT - OFFICER RANDALL

1 Q And in fact, you also said there was no particular reason
2 why you didn't mention seeing the gun tossed, right?

3 A Yes.

4 Q Would you agree that the purpose of the detailed section
5 is to give an account of the arrest?

6 A Yes.

7 Q But you didn't do that here, did you? Yes or no?

8 A No, I didn't, but that's because --

9 Q I didn't ask you why because. You didn't do it, did you?

10 A No.

11 MS. GROSS: Objection, Your Honor. Your Honor,
12 might the witness be allowed to answer question?

13 THE COURT: You may continue your answer.

14 A The reason why I told you at the disposition (sic) no
15 particular reason, I'm not trying to hid anything. I just
16 didn't write it down. In general, that's not what we do.
17 Write one sentence or two, then that's it. We give the rest
18 to the DA when we talk to them on the phone.

19 Q And you also filled out another document a memo book
20 entry, is that correct?

21 A That's correct.

22 Q And your memo book entry is something that contains an
23 entry for this incident, is that correct?

24 A Yes.

25 Q I would like to show you Plaintiff's 1. (Handing.) Can

A1010

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DIRECT - OFFICER RANDALL

1 you please take a look at that document?

2 A (Peruses document.)

3 Q Do you recognize that document?

4 A Yes, I do.

5 Q Do you recognize your handwriting on that document?

6 A Yes.

7 Q Can we agree that you, yourself, were the one that
8 prepared this document?

9 A Yes.

10 MR. NORINSBERG: ^I would offer the memo box entry
11 in evidence.

12 THE COURT: Admitted.

13 BY MR. NORINSBERG:

14 Q In your memo book entry for this incident, did you
15 mention anything at all about seeing Mr. Marshall reach into
16 his waistband?

17 A No.

18 Q Yes or no? The answer is no, correct?

19 A Yes.

20 Q Did you mention anything at all about this seeing Mr.
21 Marshall toss an object?

22 A No.

23 Q Would you agree that those are very important facts?

24 A Yes.

25 Q Can you tell the members of the jury why didn't you

A1011

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DIRECT - OFFICER RANDALL

1 mention anything in your memo book about seeing Mr. Marshall
2 reach into his waistband?

3 A Because just like the complaint report, I'm OMNI form,
4 arrest report, you write one or two sentences and give the
5 rest to the ADA.

6 Q Referring to your deposition, page 81, line 21, question,
7 "Why didn't you mention that in your memo book?"

8 Answer: "I don't know."

9 Do you recall being asked that question and giving
10 that answer at your deposition?

11 A Yes, I do.

12 Q So at your deposition, you testified that you didn't know
13 the reason why you hadn't mentioned anything in your memo
14 book, correct?

15 A That's correct.

16 Q But here today, now you have given us a reason why, is
17 that true?

18 A Yes. But at the disposition (sic), it was a totally
19 different situation than now.

20 Q You were also asked at your deposition -- strike that.

21 You understood that when you testified at that
22 deposition, you were testifying under oath, correct?

23 A Oh, definitely.

24 Q You understood when you testified at that deposition that
25 it was under penalty of perjury, correct?

A1012

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DIRECT - OFFICER RANDALL

1 A Yes.

2 Q You knew you were obligated to give the truth, the whole
3 truth and nothing but the truth, correct?

4 A Yes.

5 Q Now, you were also asked at your deposition why you never
6 mentioned anything about tossing the gun in your memo book, is
7 that correct?

8 A Yes.

9 Q Once again, you had no explanation, did you?

10 A No.

11 Q You agree, correct?

12 A Yes.

13 Q Now, Officer Randall, you retrieved -- you received
14 training from the police academy as to the types of
15 information that should be put in the memo book, correct?

16 A Yes.

17 Q You received training as to what was supposed to be put
18 in the memo book, right?

19 A Yes.

20 Q The training consists of lectures and reading materials,
21 correct?

22 A Yes.

23 Q According to that training, you were supposed to record
24 activities that occurred during your tour, true?

25 A True.

A1013

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DIRECT - OFFICER RANDALL

1 Q Now, at the time of your deposition, you testified that
2 you didn't even know what the purpose was of making a memo
3 book entry, right?

4 A Is that a question or you're telling me?

5 Q Did you testify at your deposition that you didn't even
6 know the reason why -- what a memo book is for, what the
7 purpose of make an entry is for?

8 A I don't remember.

9 Q Referring to your deposition, page 80, line eight,
10 question --

11 THE COURT: Take this down. Take this down. It's
12 not being used. I can't see the jury, please. Fold it to the
13 side.

14 MR. NORINSBERG: We have one other blowup we're
15 going to use in a minute. Perhaps we can leave these --

16 THE COURT: All right. Then leave it there for the
17 moment. Take the sign off.

18 MR. COHEN: (Complies.)

19 THE COURT: Thank you.

20 BY MR. NORINSBERG:

21 Q Question -- page 80, line eight, question: "What is the
22 purpose of making a memo book entry?"

23 Answer: "I don't know."

24 Do you recall being asked that question and giving
25 that answer at your deposition?

A1014

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DIRECT - OFFICER RANDALL

1 A Yes.

2 Q At the time of your deposition, you were a police officer
3 for eight years, correct?

4 A Yes.

5 Q So it's your sworn testimony at that deposition that you
6 didn't know what the purpose was of making a memo book entry,
7 right? Is that your testimony?

8 A There's an explanation for that, too.

9 Q There's an explanation for a lot of things you said here
10 today, right, Officer?

11 A Yes.

12 MS. GROSS: Objection; argumentative.

13 THE COURT: Sustained. Strike that.

14 BY MR. NORINSBERG:

15 Q Now, Officer you're familiar with what's known as --

16 MS. GROSS: Objection, Your Honor. The witness said
17 there's an explanation. I'd like him to be permitted to
18 answer the question.

19 THE COURT: No. It was stricken at your request.

20 BY MR. NORINSBERG:

21 Q Now, Officer, you're familiar with what's known as a
22 complaint report, correct?

23 A Yes.

24 Q A complaint report is a report of a crime that's being
25 committed, is that correct?

A1015

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DIRECT - OFFICER RANDALL

1 A Yes.

2 Q I would like to show you has been marked as Plaintiff's
3 16. (Handing.) Do you recognize this document?

4 A (Peruses document.) Yes.

5 Q What do you recognize that document to be?

6 A This is a complaint report from the incident.

7 Q You prepared the complaint report in the case, correct?

8 A I at least -- I don't know if I did it myself, but I
9 definitely signed off on it, so.

10 Q Referring to your deposition, page 116, line six,
11 question: "What else did you do during the six hours of
12 overtime?"

13 Answer: "I did the complaint report."

14 Do you recall being asked that question and giving
15 that answer?

16 A Sir, it's a three-man team.

17 Q Would you agree that at your deposition, you said that
18 you were the one that prepared the very report that I just
19 showed you, that is sitting in front of you?

20 A Yes.

21 MR. NORINSBERG: I offer the complaint report into
22 evidence.

23 THE COURT: Admitted.

24 MR. COHEN: Your Honor, at this time, I'll put this
25 here. (Publishes exhibit.)

A1016

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DIRECT - OFFICER RANDALL

1 BY MR. NORINSBERG:

2 Q Now, do you recognize this to be a blowup of the
3 complaint report that you prepared (indicating)?

4 A (Examines document.) Yes.

5 Q Once again, you never mentioned anything about seeing Mr.
6 Marshall reach into his pants and pull out a gun, is that
7 correct?

8 A Yes.

9 Q So if I understand your testimony correctly, you prepared
10 an arrest report. You prepared a memo book entry. You
11 prepared a complaint report. And yet none of those documents
12 have any mention about seeing Mr. Marshall pull out a gun and
13 toss it, true?

14 A True.

15 Q Or not true?

16 A That is true, sir.

17 MR. NORINSBERG: I'm done with that?

18 MR. COHEN: (Removes exhibit from easel.)

19 BY MR. NORINSBERG:

20 Q Now, apart from testifying before the grand jury, you
21 actually spoke to members of the Brooklyn DA's office
22 regarding this arrest, is that correct?

23 A Yes.

24 Q And you specifically told them that you saw Mr. Marshall
25 in possession of this firearm, right?

A1017

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DIRECT - OFFICER RANDALL

1 A Yes.

2 Q Now, I would like to show you Plaintiff's Exhibit 17.

3 (Handing.)

4 A (Peruses document.)

5 Q Do you recognize that document?

6 A Yes.

7 Q That's the criminal complaint based on the statement that
8 you gave, is that correct?

9 A Yes.

10 MR. NORINSBERG: ^I offer that complaint and report
11 into -- criminal complaint into evidence.

12 THE COURT: No objection? Admitted.

13 MS. GROSS: Objection.

14 THE COURT: Now you're objecting?

15 MS. GROSS: (No response.)

16 THE COURT: Are you objecting?

17 MS. GROSS: We are, Your Honor.

18 THE COURT: On what grounds?

19 MS. GROSS: The witness didn't sign this document.

20 THE COURT: On hearsay grounds?

21 MS. GROSS: Yes.

22 THE COURT: All right. You'll have to brief it.

23 I'll hold it in abeyance.

24 BY MR. NORINSBERG:

25 Q We can agree that to the extent there are any statements

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1 that refer to statements from Officer Randall, those were
2 statements that you, yourself, gave to the DA's office, true?

3 A I'm sorry. Repeat that?

4 Q To the extent that there's any mention of statements from
5 Officer Randall on this report, those statements came from
6 you, true?

7 A Yes.

8 MR. NORINSBERG: ^And again, I offer the documents
9 as evidence.

10 THE COURT: Admitted.

11 BY MR. NORINSBERG:

12 Q Now, you told the prosecutors in the Brooklyn DA's office
13 that you saw Mr. Marshall in physical possession of this gun,
14 right?

15 A Yes.

16 Q But in fact, you never saw Mr. Marshall in actual
17 physical possession of this gun, true?

18 A Incorrect.

19 Q Referring to your deposition, page 58, line 20, question:
20 "You never saw the object in Mr. Marshall's actual physical
21 possession, correct?"

22 Answer: "That is correct."

23 Do you recall being asked that question and giving
24 that answer?

25 A Yes.

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1 Q So according to your deposition testimony, you never saw
2 the object in Mr. Marshall's actual physical possession, true?

3 A I'm sorry. One more time?

4 Q According to your sworn deposition testimony, you never
5 saw the gun in Mr. Marshall's actual physical possession,
6 true?

7 A Yes. Like I explained before --

8 Q Is that true or not true?

9 A Yes.

10 MS. GROSS: Objection. Objection, Your Honor.

11 THE COURT: You may continue your answer.

12 A The reason why I say there's a play on words is because
13 the whole time I've said the same thing: I saw Mr. Marshall
14 pull a gun out of his pants, take it, and toss it into the
15 street, while standing behind Mr. Meade. And while --

16 Q Okay. I'm sorry. Continue.

17 A While he was behind Mr. Meade, yes, part of my view was
18 blocked, so I never saw actually had my eye balls on the gun
19 as he threw it.

20 But he pulled it out, threw it on the curb. I went
21 towards -- I heard the clink on the curb, on the sidewalk --
22 I'm sorry, on the street -- saw the gun, and it was obvious
23 that he had pulled that gun out and threw it. So I did see
24 him take a gun and throw it on the ground. I just never
25 actually -- I wasn't -- I didn't see the gun as he was pulling

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1 it out.

2 Q So if I understand your testimony, though, you have been
3 consistent all along. That's what you told everybody, right?

4 A Absolutely.

5 Q You told that to to Brooklyn DA's office, right?

6 A Yes.

7 Q But then you met with another prosecuting attorney,
8 didn't you?

9 A I don't remember who.

10 Q Do you recall telling another prosecuting attorney named
11 Judy Phillips that you never actually saw Mr. Marshall with
12 this gun?

13 MS. GROSS: Objection. Objection, Your Honor.

14 A No, I said the same thing all along.

15 BY MR. NORINSBERG:

16 Q Do you recall -- you don't recall making that statement,
17 its that your testimony?

18 A I never said that. I said what I just told you.

19 Q I would like to show you Plaintiff's Exhibit 5 for
20 identification. (Hanging.)

21 A (Peruses document.)

22 Q I'm going to direct --

23 MS. GROSS: Objection, Your Honor.

24 Q -- your attention to one particular sentence here.

25 MS. GROSS: Your Honor, I object.

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1 THE COURT: Object to what?

2 MS. GROSS: I object to the use of this document,
3 Your Honor. This is not being used to refresh.

4 MR. NORINSBERG: I'm about to refresh.

5 THE COURT: I'm going to allow the examination to
6 continue up to this point. When something objectionable
7 happens, you may object.

8 MS. GROSS: Your Honor, as I understand, the witness
9 doesn't -- his recollection doesn't needs refreshing on this
10 point. He answered the question.

11 THE COURT: He will tell us that, not you. Sit
12 down, counsel.

13 BY MR. NORINSBERG:

14 Q Sir, looking at the part of that document that I just
15 circled, does that refresh your memory that, in fact, you told
16 the another prosecuting attorney --

17 MS. GROSS: Objection.

18 BY MR. NORINSBERG:

19 Q -- named Judy Phillips that you never saw Mr. Marshall in
20 possession of this gun?

21 MS. GROSS: Objection, Your Honor.

22 BY MR. NORINSBERG:

23 Q Does that refresh your memory, yes or no?

24 THE COURT: Counsel, I overruled your objection.

25 A No.

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1 THE COURT: You may continue.

2 BY MR. NORINSBERG:

3 Q Now, you're familiar with the Gun Enhancement Unit of the
4 New York City Police Department?

5 A Yes.

6 Q And you met with members of the Gun Enhancement Unit at
7 some point after this arrest, true?

8 A I might have spoken on the phone, but I did speak to
9 them.

10 Q Do you recall telling members of the Gun Enhancement Unit
11 that you never actually saw Mr. Marshall in possession of this
12 gun?

13 A I recall telling them that I saw him take a gun out of
14 his pants and throw it in the street.

15 Q Referring to your deposition, page 59, line 25, question:
16 "Did you ever tell the members of the Gun Enhancement Unit
17 that you did not observe Mr. Marshall in possession of any
18 gun?"

19 Answer: "I can't remember."

20 Do you recall giving that testimony?

21 A Yes.

22 Q In that your deposition, you couldn't remember. And in
23 fact, you made that statement to the members of the Gun
24 Enhancement Unit, correct?

25 A That's not what I meant, though. What I was trying to

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1 say was ---

2 Q I just asked you whether you gave that testimony, sir.

3 MS. GROSS: Objection.

4 A Yes.

5 BY MR. NORINSBERG:

6 Q And as you sit here today, would you agree that you might
7 well have told a member of the Gun Enhancement Unit that you
8 never observed Marshall in possession of a gun?

9 A No.

10 Q Referring to your deposition, question -- page 60, line
11 13, question: "As you sit here today, can you rule out the
12 possibility that you made that statement?"

13 Answer: "Well, since I don't remember, it may or
14 may not be true."

15 Do you recall giving that testimony?

16 A Yes.

17 Q So at your deposition you would agree that it may be true
18 that you made that statement, but you couldn't remember,
19 right?

20 A What I'm trying to say is --

21 Q Was that your testimony, deposition testimony?

22 A Yes.

23 Q You reviewed that deposition before coming in here today,
24 right?

25 A Yes.

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1 Q You reviewed it very carefully, right?

2 A Yes.

3 Q Now, going back to your first meeting with the prosecutor
4 in the Brooklyn DA's office, you understood that the
5 statements that you made to that DA were very important?

6 A Yes.

7 Q You understood that whatever information you provided
8 that district attorney could result in a prosecution of felony
9 charges for Mr. Marshall, correct?

10 A Yes.

11 Q Now, you told us earlier that you were the arresting
12 officer in this case, right?

13 A Yes.

14 Q Yet it was Officer Burbridge who first pointed out
15 Mr. Marshall, right?

16 A Yes.

17 Q It was Officer Burbridge who decided to stop Mr.
18 Marshall, right?

19 A Yes.

20 Q It was Officer Burbridge who actually questioned Mr.
21 Marshall, right?

22 A Yes.

23 Q It was Officer Burbridge who found the gun, right?

24 A Yes.

25 Q Officer Randall, can you tell the members of this jury,

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DIRECT - OFFICER RANDALL

1 can you think of any reason at all why you were the arresting
2 officer in this case?

3 A Yes.

4 Q Referring to your deposition, page 58, line four,
5 question: "As you sit here today, can you think of any reason
6 why you were the arresting officer in this case?"

7 Answer: "No."

8 Do you recall giving that testimony at your
9 deposition?

10 A Yes, I do.

11 Q So at your deposition, you couldn't think of any reason
12 at all why you were the actual arresting officer, right?

13 A Sir, at the disposition (sic) --

14 Q Is that correct?

15 A At the disposition (sic)?

16 Q Is that correct, at your deposition?

17 MS. GROSS: Objection.

18 THE WITNESS: Can I explain?

19 THE COURT: Well, answer the question yes or no if
20 you can, then --

21 THE WITNESS: Yes.

22 THE COURT: Then you may explain.

23 THE WITNESS: I want to explain that at the
24 disposition (sic), the reason why ---

25 Q Answer the question, yes or no?

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DIRECT - OFFICER RANDALL

1 A Yes, sir.

2 THE COURT: You may explain.

3 A Yes, sir. Yes. At the disposition (sic), the reason
4 why --

5 BY MR. NORINSBERG:

6 Q He answered the question.

7 MR. LOONAM: He may explain.

8 A The reason why I said that was, because to be honest with
9 you, there was no one there, even though I did have a lawyer,
10 to object. I felt like I was being badgered and that you were
11 being unpleasant. So I really wasn't thinking very well, as
12 opposed to today, this is different.

13 BY MR. NORINSBERG:

14 Q So today, now, you feel like you can give clearer answers
15 than you could at the deposition, right?

16 A Absolutely.

17 Q You had a lawyer at the deposition, didn't you?

18 A Even though he objected, he couldn't stop you from
19 continuing your line questioning, and you said whatever you
20 want.

21 Q You had a lawyer named Steve Severedis, right?

22 A Yes.

23 Q He's was aggressively representing you at this
24 deposition, wasn't he?

25 A He did his best.

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DIRECT - OFFICER RANDALL

1 Q He was making multiple objections, wasn't he?

2 A They didn't do anything.

3 MS. GROSS: Objection.

4 BY MR. NORINSBERG:

5 Q Would you agree --

6 THE COURT: Move to another point.

7 BY MR. NORINSBERG:

8 Q -- that you have a discussion with your fellow officers
9 about who was going to take the arrest, right?

10 A Yes.

11 Q And can you tell us Officer Randall, what exactly was
12 said during this discussion?

13 A I can't remember exactly, but I can tell you that the
14 result of the conversation was I was going to take it.

15 Q So you're not sure what was said, but you knew you were
16 going to be the arresting officer, right?

17 A I didn't know. I found out after that conversation that
18 I would be the arresting officer.

19 Q And that conversation took place at the scene, isn't that
20 true?

21 A It might have been on the way back to the precinct.
22 Might have been in the precinct.

23 Q You didn't remember?

24 A I don't remember exactly.

25 Q Now, would you agree that according to your memory book,

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DIRECT - OFFICER RANDALL

1 you didn't make any other stops that evening?

2 A Yes.

3 Q And would you agree that according to the memo book, you
4 didn't make any other arrests that evening, right?

5 A Yes.

6 Q Now, after the arrest you put in for overtime, is that
7 correct?

8 A That is correct.

9 MS. GROSS: Objection.

10 MR. NORINSBERG: You put in for six hours --

11 THE COURT: I'll allow it.

12 BY MR. NORINSBERG:

13 Q -- you put in for six hours of overtime, correct?

14 A Yes.

15 Q Now, this took you approximately just five minutes to get
16 to the precinct, right?

17 A About.

18 Q But then you were at the precinct for another six hours,
19 is that correct?

20 A No.

21 Q But you put in for six hours of overtime, right?

22 A Yes.

23 Q Now, going back to the point where you claim that you saw
24 Mr. Marshall remove out his gun, can you tell the jury where
25 exactly did he remove his gun from? Was it his right side in

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DIRECT - OFFICER RANDALL

1 the front, his left side in the front or somewhere else?

2 A I know it was in front of his waistband.

3 Q Was it in his right or left side or somewhere else?

4 A I don't remember.

5 Q Did Mr. Marshall reach into his pants with his right hand
6 or his left hand?

7 A Actually, I can't remember that, either.

8 Q How large was the object that was pulled out his pants?

9 A We know that the gun was about nine inches in length.

10 Q At the time of your deposition, you didn't know, right?

11 A No, I didn't know that yet.

12 Q When you saw Mr. Marshall and Mr. Meade for the first
13 time, was Mr. Marshall walking closer to the buildings going
14 down Park Street or closer to the street?

15 A Mr. Marshall was walking closer to the buildings.

16 Q Referring to your deposition, page 31, line 22, question:
17 "Was Mr. Marshall walking closer to this street or closer to
18 the buildings on Park Street?"

19 Answer: "I don't recall."

20 Do you recall giving that testimony?

21 A Yes.

22 Q But your memory is better here today than it was at the
23 deposition, is that correct?

24 A Absolutely.

25 Q Now, at the time when you made these observations, you

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DIRECT - OFFICER RANDALL

1 were inside of the police vehicle, is that correct?

2 A That is correct.

3 Q You were the back seat behind the driver, correct?

4 A Yes.

5 Q And you were somewhere between ten and 25 feet away from
6 where the gun was supposedly being removed, correct?

7 A Yes.

8 Q And it was dark out, right?

9 A It was lit by street lamps.

10 Q Referring to page 36e, line 23, question: "Was it dark
11 out at that time?"

12 Answer: "Yes."

13 Page 37, line four, question: "Where was the
14 closest light from where Mr. Marshall was standing?"

15 Answer: "I can't recall."

16 MS. GROSS: Objection, Your Honor.

17 BY MR. NORINSBERG:

18 Q Do you recall being asked those questions and giving
19 those answers?

20 MS. GROSS: Objection.

21 A Yes.

22 THE COURT: Excuse me. Why?

23 MS. GROSS: The objection is that he omitted part of
24 the questioning there, and it --

25 THE COURT: Go ahead and read the whole thing,

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1 please.

2 MS. GROSS: Lines 25 through three on the next page.

3 MR. NORINSBERG: I'll read the whole thing again,
4 Your Honor, this is --

5 BY MR. NORINSBERG:

6 Q Question, this is page 36, line 23, question: "Was it
7 dark out at that time?"

8 Answer: "Yes."

9 Question: "Were there any lights on that street?"

10 Answer: "Yes."

11 Question: "Where was the closest lights from where
12 Mr. Marshall was standing?"

13 Answer: "I can't recall."

14 Do you recall giving that testimony?

15 A Yes.

16 THE COURT: How much longer is your direct going to
17 take?

18 MR. NORINSBERG: We're close to the end, Your Honor,
19 I mean --

20 THE COURT: All right. I want to take a break, but
21 we can -- I'd rather you finish.

22 MR. NORINSBERG: I think it would make sense, we
23 could take a brief recess and then could I close out whatever
24 issues we haven't covered.

25 THE COURT: All right. Fine.

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1 Why don't you take a ten-minute break, ladies and
2 gentlemen? Do not discuss the case. Don't do any research of
3 your own.

4 (Jury exits.)

5 THE COURT: All right. Take ten minutes everyone,
6 please.

7 You can step down, sir.

8 (Witness steps off the stand.)

9 (Recess.)

10 (Continued on the next page.)

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1 (The jury entered.)

2 THE COURT: Proceed, please. Mr. Witness, will you
3 take the stand, please.

4 CONTINUED DIRECT EXAMINATION

5 MR. NORINSBERG:

6 Q Good morning again, Officer Randall.

7 A Hi.

8 Q You told us earlier that Officer Burbridge retrieved the
9 gun, right?

10 A Yes.

11 Q And then, he handed it over to you, correct?

12 A Yes.

13 Q And then, you put it in a paper bag, right?

14 A Yes.

15 Q And the reason you put it into the paper bag was so that
16 no other officer would get any fingerprints on it, right?

17 A Part of it, yes.

18 Q Now, as a police officer, you know that somebody might
19 leave fingerprints on a gun, right?

20 A Yes.

21 Q So you want to do everything possible to preserve that
22 evidence, correct?

23 A Yes.

24 Q And one way of showing that this gun belonged to
25 Mr. Marshall would be to check for his fingerprints, true?

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DIRECT - OFFICER RANDALL

1 A Yes.

2 Q If Mr. Marshall's fingerprints were on that gun, that
3 would be an important piece of evidence, right?

4 A Yes.

5 Q That would show conclusively that the gun belonged to
6 him, correct?

7 A Yes.

8 Q Now, when you were back at the precinct, you took
9 Mr. Marshall's fingerprints at the precinct, right?

10 A Yes.

11 Q So you have a set of his fingerprints to compare with any
12 prints that might be found on the gun, correct?

13 A I don't do that, but it can be done.

14 Q Now, as the arresting officer, you certainly would be
15 interested to know if Mr. Marshall's fingerprints were found
16 on that gun, right?

17 A Yes.

18 Q Were Mr. Marshall's fingerprints ever found on this gun?

19 A No.

20 Q Were Mr. Marshall's fingerprints ever found on the
21 cartridge inside the gun?

22 A No.

23 Q Now, as the arresting officer, did you ever actually
24 request that the fingerprints be lifted from this gun?

25 A No.

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DIRECT - OFFICER RANDALL

1 Q Referring to your deposition testimony, Page 64, Line 23,
2 "QUESTION: Did you ever ask for fingerprints to be lifted
3 from this gun?

4 "ANSWER: Yes."

5 Do you recall giving that testimony at your
6 deposition?

7 A Yes, I do.

8 Q So according to your deposition testimony, you actually
9 asked for fingerprints to be lifted, right?

10 A I thought I did, yes.

11 Q But, in fact, you didn't, correct?

12 A That is true.

13 Q I'd like to show you the complaint report again. Now,
14 Officer, you have a copy of this same exhibit in front you; is
15 that correct?

16 A I have the typed one.

17 Q You have the typed one in front of you?

18 A Right.

19 Q I'm going to show you now what's been marked as
20 Plaintiff's Exhibit 2 for identification. If you could, take
21 a look at it. (Handing.)

22 A Okay.

23 Q Is that the handwritten version of the same document,
24 Officer?

25 A Yes.

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DIRECT - OFFICER RANDALL

1 Q It's the same document we're looking at here?

2 A Yes.

3 MR. NORINSBERG: I offer the handwritten version
4 into evidence, as well.

5 THE COURT: Any objection? Admitted.

6 MS. CASTRO: Your Honor, what exhibit number is it?
7 Because Plaintiff's two, according to our records, was
8 Plaintiff's Exhibit 16, which is not a handwritten version.

9 THE COURT: Show it to counsel.

10 MR. NORINSBERG: We previously offered 16 into
11 evidence, and this is the handwritten version of 16 which is
12 marked separately as Exhibit 2.

13 THE COURT: All right.

14 MR. NORINSBERG: So I've offered two into evidence?

15 THE COURT: Yes, it's admitted.

16 (Plaintiff's Exhibit 2 was marked in evidence, as of
17 this date.)

18 BY MR. NORINSBERG

19 Q Now, Officer Randall, on this complaint report, there is
20 a section on the report that actually specifically says
21 "prints requested"; is that correct?

22 A Yes.

23 Q And then, there's a box to say yes, they were requested
24 or no, they were not requested, right?

25 A Yes.

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DIRECT - OFFICER RANDALL

1 Q You've checked the box "no"; is that correct?

2 A No.

3 Q You testified earlier that you were the one that prepared
4 the complaint report, correct?

5 A I reviewed it.

6 Q Okay. So your testimony is that you checked that box
7 "no," or is it that somebody else did?

8 A It was a clerical error.

9 Q It was a mistake?

10 A Yes.

11 Q According to this document, you did not request
12 fingerprints; true or not true?

13 A That is true.

14 Q And according to the typewritten version of this
15 document, there's the same section that appears; prints
16 requested or not requested, correct?

17 A Yes.

18 Q And on that document also, there's a "yes" and "no" box,
19 correct?

20 A Yes.

21 Q And on that box -- on that document as well, the "no" box
22 is checked, correct?

23 A Correct.

24 Q So two of these documents have the same option. And on
25 both documents, you did not request fingerprints to be tested;

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1 true or not true?

2 A Well, first you write one out. And then, you read off
3 the first one while you type onto the printed one. So if I
4 checked "no" here, I would probably also check "no" on the
5 computer also.

6 Q Can we agree that according to the complaint report, no
7 request for fingerprints was ever made by you?

8 A We can agree, yes.

9 Q Officer Randall, can you please tell this jury, can you
10 think of any reason at all why fingerprints would not have
11 been requested in this case?

12 A Not at all.

13 MS. GROSS: Objection.

14 BY MR. NORINSBERG

15 Q You cannot think of a reason?

16 THE COURT: Excuse me. If you're going to make an
17 objection to a question, you have to make it before the
18 witness answers.

19 MS. GROSS: Yes, your Honor.

20 THE COURT: So in the future, please stand, and the
21 witness will not answer, and I can rule. Since the question
22 has now been answered, we'll let it stand. Proceed.

23 BY MR. NORINSBERG

24 Q So to be clear about your testimony, you cannot think of
25 any reason why fingerprints wouldn't have been requested,

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1 true?

2 A That's true.

3 Q In fact, you were specifically told by your supervisors
4 to get prints for every gun arrest, correct?

5 THE COURT: Excuse me, take this down.

6 MS. GROSS: Objection.

7 THE COURT: Overruled.

8 THE WITNESS: That is correct, sir.

9 BY MR. NORINSBERG

10 Q But that was not done in this case according to your
11 complaint report, true?

12 A Yes.

13 Q Now, you told us earlier that you were as many as 25 feet
14 away in the car when you saw the gun being removed; is that
15 correct?

16 A Yes.

17 Q So would it be fair to say that Mr. Marshall was up to
18 25 feet in front of you from where you were?

19 A Part of it was in front of me, part of it was on the side
20 of me. He was at a diagonal angle.

21 Q But he was approximately 25 feet ahead of you at some
22 angle, correct?

23 A He could have been up to 25 feet, yes.

24 Q Now, if he was ahead of you at some angle 25 feet, you
25 were looking at his back, correct?

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DIRECT - OFFICER RANDALL

1 A At what point?

2 Q At the point where he supposedly removed a weapon.

3 A Incorrect.

4 Q Would you agree, Officer, when you got out of the car,
5 the first thing you asked him was, "Whose gun is this?"

6 A No.

7 Q In fact, your fellow officers repeatedly asked, "Whose
8 gun is this, or you're both going in."

9 Didn't you say that?

10 A No. No one said that.

11 Q No one asked that question?

12 A No.

13 Q Now, Officer, you've testified before in court; is that
14 correct?

15 A Yes.

16 Q You testified multiple times in court, right?

17 A Yes.

18 MS. GROSS: Objection. Objection, your Honor.

19 THE COURT: Overruled.

20 BY MR. NORINSBERG

21 Q At the time of your deposition, you had testified
22 approximately 50 times in court, true?

23 A Yes.

24 Q And on top of that, you testified another 50 times in the
25 grand jury proceedings, correct?

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DIRECT - OFFICER RANDALL

1 A Yes.

2 Q So you had given sworn testimony in court proceedings
3 approximately 100 times at the time you testified at your
4 deposition, correct?

5 A Correct.

6 Q You were a seasoned, veteran cop familiar with
7 testifying, true?

8 A I wouldn't go that far.

9 Q Would you agree, Officer Randall, that Mr. Marshall has
10 given testimony that is completely contrary to what your
11 testimony is?

12 MS. GROSS: Objection.

13 THE COURT: Sustained. Don't answer.

14 MR. NORINSBERG: I'd like you to assume that
15 Mr. Marshall will testify in this courtroom, as he has
16 previously, that he did not have any gun in his possession and
17 did not toss away a gun. Assuming he testifies to that in
18 this courtroom --

19 MS. GROSS: Objection.

20 THE COURT: Sustained.

21 MR. NORINSBERG: Would you agree --

22 THE COURT: Sustained. That's for the jury, not for
23 the witness.

24 BY MR. NORINSBERG

25 Q Would you agree that if you're telling the truth --

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DIRECT - OFFICER RANDALL

1 MS. GROSS: Objection.

2 THE COURT: Let him finish the question, please.

3 BY MR. NORINSBERG

4 Q Would you agree that if you're telling the truth, that
5 Mr. Marshall must have had a gun on him?

6 MS. GROSS: Objection.

7 THE COURT: Sustained.

8 MR. NORINSBERG: Now, as the arresting officer, you
9 were interested in finding out the outcome of the charges
10 against Mr. Marshall, right?

11 THE WITNESS: Yes.

12 BY MR. NORINSBERG

13 Q And at some point, you learned the outcome of those
14 charges; is that correct?

15 A Yes.

16 Q You learned that all charges against Mr. Marshall had
17 been dismissed, correct?

18 A Yes.

19 MR. NORINSBERG: Thank you. I have nothing further.

20 THE COURT: Thank you.

21 CROSS-EXAMINATION

22 BY MS. GROSS

23 Q Good morning, Officer Randall.

24 A Good morning.

25 Q I wanted to ask you a couple of questions about your

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CROSS - OFFICER RANDALL

1 background. But before we do, counsel just asked you several
2 questions about prior statements you had made during the
3 course of your deposition to the effect that you had never
4 seen Plaintiff in actual, physical possession of the gun.

5 Do you recall those questions?

6 A Yes.

7 Q What did you mean by that?

8 A Well, what I mean is I saw Marshall reach into his
9 waistband, pull out an object, underhandedly toss it towards
10 the street where I heard a clink. I got out the car, I looked
11 to the point where I heard the noise, and saw the silver
12 firearm on the street. From that point, I knew that he had --
13 the object that he pulled out of his pants was, in fact, a
14 gun.

15 So yeah, he had a gun in his hand as he pulled it
16 and threw it. Where the confusion is coming in is that I said
17 he was -- because he was standing behind his associate, you
18 know, trying to hide, part of my vision was blocked. So no, I
19 didn't actually see -- I didn't have eyeballs on the gun,
20 itself, but I saw him as he pulled the gun and tossed it.
21 That's where the confusion is coming in.

22 Q So counsel also asked you about several documents,
23 including the arrest report, in which you wrote that Defendant
24 was found in possession of a loaded firearm.

25 What did you mean by that statement?

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CROSS - OFFICER RANDALL

1 A Well, it's the same statement I put on the all the
2 paperwork. It says at TPO, Defendant was found to be in
3 possession of a loaded firearm. Basically I'm saying the
4 basic facts that at time, place of occurrence -- which is the
5 time and date on the report -- we found him to have possession
6 of a gun. That's what we wrote.

7 Q Counsel asked you about the arrest report. He asked why
8 there weren't additional details.

9 Can you explain that to the jury?

10 A Well, the reason why there weren't any additional details
11 is, like I said before, we usually tell it to the D.A. while
12 we're doing the paperwork. And when I say "we," the three-man
13 team. We don't -- usually, we don't put a long, drawn out,
14 you know, description of what happened. We write something
15 short, to the point. And then, later on in court -- or later
16 on, we talk to the D.A. And then, we elaborate on those
17 points. And it was consistent in my memo book, the complaint
18 report and the arrest report. You know, it was all the same.
19 And that's just, in general, what we do.

20 Q Okay. You were asked previously about statements that
21 you made to a person from the gun enhancement unit. Did you
22 make a statement to the person from the gun enhancement unit
23 that you saw Plaintiff in possession of the gun?

24 A I told the guy from the gun enhancement unit the same
25 thing I just said now. Whatever they wrote down, that's their

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CROSS - OFFICER RANDALL

1 interpretation of what I said.

2 Q Okay. I'd like to turn now to your background.

3 Could you please tell us where you're currently
4 employed.

5 A I currently work at NYPD.

6 Q What rank do you hold in the police department?

7 A Police officer.

8 Q What date were you first appointed as a police officer?

9 A July 1st, 2003.

10 Q Did you attend the police academy?

11 A Yes.

12 Q Did you graduate from the academy?

13 A Yes.

14 Q And have you been assigned to different commands during
15 your career at the NYPD?

16 A Yes.

17 Q What were some of your different responsibilities?

18 A Patrol, basically responding to incidents, responding to
19 calls for help.

20 Q Where are you currently assigned?

21 A I'm currently assigned to Brooklyn North task force.

22 Q And where were you assigned on May 15th, 2008?

23 A Brooklyn North anti-crime unit.

24 Q What were your duties in the anti-crime unit?

25 A It's a part of patrol. We drove around in an unmarked

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CROSS - OFFICER RANDALL

1 car in high-crime areas looking to prevent crime and respond
2 to jobs.

3 Q Which neighborhoods was the anti-crime unit responsible
4 for?

5 A We covered the whole Brooklyn North, but we focused on
6 the high-crime areas of Bushwick, Brownsville, Bed-Stuy, Crown
7 Heights.

8 Q How long were you in the anti-crime unit?

9 A About three years.

10 Q Where is that unit based out of?

11 A It's based out of the 77 Annex.

12 Q And is that in Bushwick?

13 A No. The 77 Annex is actually in Crown Heights.

14 Q As of May 15th, 2008, how many arrests have you made?

15 A About 30.

16 Q And how many of those were gun arrests?

17 A Maybe three or four.

18 Q I'd like to turn your attention to May 15th, 2008.

19 Were you working that day?

20 A Yes.

21 Q What day of the week was it?

22 A I believe it was a Tuesday going into a Wednesday or a
23 Wednesday going into Thursday.

24 Q Do you have your memo book in front of you to refresh?

25 A I'm sorry. Yes, I do. It was a Wednesday night going

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CROSS - OFFICER RANDALL

1 into Thursday morning.

2 Q Were you working a specific tour of duty?

3 A Right. We worked 5:30 at night to 2:05 the next morning.

4 Q Did you go out on patrol that tour?

5 A Yes.

6 Q Who did you go a patrol with?

7 A Officers Fox and Officer Burbridge.

8 Q Where did you go out on patrol?

9 A That night, we were covering mainly the
10 Bedford-Stuyvesant area and Bushwick.

11 Q Were you wearing a police uniform?

12 A No.

13 Q What were you wearing?

14 A We were wearing regular clothes, plain clothes.

15 Q Were you wearing a shield?

16 A Yes.

17 Q What type of patrol car were you in?

18 A We were in an unmarked RMP.

19 Q Can you describe what that is?

20 A Basically, an unmarked RMP is a -- it's a police car
21 which is usually dark in color. It has no clear police
22 markings on it.

23 Q Let's turn to your encounter with Plaintiff. During your
24 patrol on May 15th, did you encounter a man by the name of
25 Joshua Marshall?

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CROSS - OFFICER RANDALL

1 A Yes.

2 Q Is he in the courtroom today?

3 A Yes.

4 Q Did you later learn that person was a Plaintiff in this
5 case?

6 A Yes.

7 Q Had you ever met or encountered him prior to this
8 incident?

9 A No.

10 Q Where did you encounter him on May 15th?

11 A At Park and Broadway.

12 Q What time of day was it?

13 A About one in the morning.

14 Q How would you describe the neighborhood?

15 A It's a high-crime area.

16 Q Why do you say that?

17 A Well, compared to other parts of New York City, other
18 parts of Brooklyn, there's a lot more violent crime there, you
19 know, comparatively.

20 Q How did you come to encounter Plaintiff near Broadway and
21 Park Street that day?

22 A I first observed him walking down Broadway towards Park
23 Street.

24 Q Would it help you to view an enlarged version of the
25 scene?

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CROSS - OFFICER RANDALL

1 A Yes.

2 MS. GROSS: May I approach, your Honor?

3 THE COURT: Yes.

4 MS. GROSS: Your Honor, I'm showing the witness
5 what's been premarked for identification as Exhibit F1, which
6 Plaintiff's counsel has seen.

7 BY MS. GROSS

8 Q Officer Randall, do you recognize this location?

9 A Yes.

10 MS. GROSS: Your Honor, I move that Exhibit F1 be
11 admitted and that I be permitted to publish it to the jury.

12 THE COURT: Granted.

13 MS. GROSS: Your Honor, may I ask the witness to
14 step down and point out?

15 THE COURT: Yes.

16 MS. GROSS: Officer Randall, will you please step
17 down.

18 BY MS. GROSS

19 Q Officer Randall, can you describe where you first saw
20 Mr. Marshall and his associate.

21 A Around here.

22 Q Which way were they walking?

23 A Towards Park.

24 THE COURT: Would you give the witness a marking
25 pencil, please.

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CROSS - OFFICER RANDALL

1 THE WITNESS: Right by that "X."

2 THE COURT: Put your initials next to that, please.

3 BY MS. GROSS

4 Q Which way were Mr. Marshall and his associate walking?

5 A Towards --

6 THE COURT: Indicate with an arrow, please.

7 BY MS. GROSS

8 Q Which street is this?

9 A This is Broadway.

10 Q And which street is this side street?

11 A Park Street.

12 Q Where were you and your fellow officers?

13 A We were stopped here at this intersection. It's kind of
14 off a little, but here.

15 THE COURT: Mark that with a two and your initials.
16 That's in the lower right.

17 THE WITNESS: Yes, sir.

18 BY MS. GROSS

19 Q I'm sorry. So the officer's -- your car was here
20 approximately?

21 A It's approximately here.

22 Q Were you stopped?

23 A Yes.

24 Q How did Mr. Marshall appear when you first saw him?

25 A Well, he appeared as he does today.

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CROSS - OFFICER RANDALL

1 Q What happened next?

2 A Well, he looked in our direction. And then, he looked
3 alarmed. His eyes bulged out. And then, he waved his friend
4 as they were walking this way -- not his friend, I'm sorry --
5 his associate who he's walking with.

6 They got to the corner, saw us, looked alarmed. He
7 told the other person -- he waved him on, like come with me,
8 waving towards himself. That's when he made the turn down
9 Park Street.

10 Q What happened next?

11 A That's when we made the turn onto Park Street. We were
12 going against traffic. It's a one-way street going this way.
13 We pulled up beside them. That's when Officer Burbridge asked
14 him, "Can I have a moment of your time?"

15 THE COURT: Is that shown on that exhibit?

16 MS. GROSS: Your Honor, I'd like to show the witness
17 another exhibit.

18 THE COURT: Fine.

19 BY MS. GROSS

20 Q Officer Randall, what is this? What does this represent?

21 A That is a continuation of that photo. This is to the
22 point of Park Street and Broadway.

23 THE COURT: Give us the number, please.

24 MS. GROSS: I'm sorry. It's Defendant's Exhibit D1.

25 THE COURT: D as in dog?

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CROSS - OFFICER RANDALL

1 MS. GROSS: Correct.

2 THE COURT: Mark it in evidence.

3 (Defendant's Exhibit D1 was received in evidence, as
4 of this date.)

5 THE COURT: The first photograph is?

6 MS. GROSS: F1.

7 THE COURT: Marked in evidence.

8 (Defendant's Exhibit F1 was received in evidence, as
9 of this date.)

10 THE WITNESS: Basically, this is just the
11 continuation of where it cuts off.

12 BY MS. GROSS

13 Q What street is that?

14 A It's Park Street.

15 Q Can you describe what happened next.

16 A Well, at that point, like I said, Burbridge asked
17 Marshall, "Can I have a moment of your time?" And Marshall
18 was walking closer to the wall, and the other, Meade, was
19 walking closer to the car.

20 Q Where were you?

21 A I was in the car. We were -- this is the view as I saw
22 it. So our car was here.

23 THE COURT: Mark that as three and your initials.
24 And where was the Plaintiff at that moment? Mark that with an
25 "X" and your initials.

A1053

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CROSS - OFFICER RANDALL

1 BY MS. GROSS

2 Q So as you approached, what did you see?

3 A At that point, I saw Marshall take a short step trying to
4 hide behind his friend who was about five-nine, maybe 150, a
5 very slim guy, and reach in his waistband, pull out the weapon
6 which we know is 9 inches long. There was a long draw, and
7 then underhandedly tossed it in the street towards, you know,
8 towards the car.

9 Q What did you hear next?

10 A At that point, we heard the clink of the gun hitting the
11 ground.

12 Q What was the lighting like at that time?

13 A It was nighttime, but there were street lamps. This is
14 one right here. So it's directly underneath the street lamp.

15 Q Where were Officers Burbridge and Fox -- where was
16 Officer Burbridge at that time?

17 A At what point?

18 Q As you approached.

19 A As we approached, Burbridge was sitting in the front,
20 passenger side of the car.

21 Q Where was Officer Fox?

22 A Fox was driving.

23 Q From the back seat, describe your view.

24 A Well, I was looking diagonally, so I was looking through
25 the front window. So I had to, kind of, peek -- look up a

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CROSS - OFFICER RANDALL

1 little bit to see out.

2 Q What happened when you got out of the --

3 THE COURT: Were there cars along the curb?

4 THE WITNESS: There were cars, but there were no
5 minivans, just regular cars. So the cars that were here
6 weren't this tall. We could see. We stopped -- just how this
7 looks, we stopped between the cars so we could see.

8 THE COURT: They were parked in the direction
9 opposite to the one you were traveling in, correct? You were
10 going up the street --

11 THE WITNESS: Yes.

12 THE COURT: -- and they were parked going down the
13 street?

14 THE WITNESS: Yes.

15 THE COURT: Proceed.

16 BY MS. GROSS

17 Q Where did you see the gun next?

18 A The gun was right on the ground. You can't see it in the
19 picture, but by the curb.

20 Q Officer, you may be seated.

21 Officer Randall, can you describe what this is?

22 A That is a 38 caliber Smith & Wesson revolver.

23 Q Is this the gun you recovered from the scene?

24 A Yes, it is.

25 Q How do you know that?

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CROSS - OFFICER RANDALL

1 A Because I engraved my initials on it.

2 Q I'm sorry, could you come up and show us where your
3 initials are.

4 THE COURT: What's that exhibit number, please?

5 MS. GROSS: Exhibit C1.

6 THE COURT: Admitted.

7 (Defendant's Exhibit C1 was received in evidence, as
8 of this date.)

9 BY MS. GROSS

10 Q And what are these?

11 A Those are rounds recovered from the firearm.

12 Q How many rounds were recovered?

13 A Six.

14 Q Could you describe the gun a little bit. What kind of
15 gun is it?

16 A It's a Smith and Wesson, 38 cal, 4-inch barrel. It's
17 about 9 inches in length total with a revolver, six shot.

18 Q Officer Randall, what did you do after the gun hit the
19 ground?

20 A As soon as we heard the gun hit the ground, I got out the
21 car. I immediately approached Mr. Marshall, told him to put
22 his hands behind his back, and put cuffs on him.

23 Q So he was under arrest?

24 A Yes.

25 Q Who recovered the gun?

A1056

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CROSS - OFFICER RANDALL

1 A Officer Burbridge.

2 Q What did he do with the gun?

3 A We had a -- he put it in a paper bag that Fox gave us,
4 and he gave it to me.

5 Q What did you do with the gun?

6 A I just held the gun on my person, you know, for the rest
7 of the night until ECT came and took it from me.

8 Q What offense was Plaintiff arrested for?

9 A Criminal possession of a firearm.

10 Q Why didn't you arrest his associate, Demetrios Meade?

11 A Because Demetrios Meade didn't pull a gun out of his
12 pants and throw it on the ground.

13 Q At any point during the incident, did you say, whose gun
14 was it, whose gun was it?

15 A No. That was never said.

16 Q Was there any doubt in your mind whose gun it was?

17 A There was no doubt. As soon as I saw him reach in his
18 pants, I knew something was going on. When I saw the motion
19 to pull it out, it was a little more suspicious. When I saw
20 the underhanded toss, I heard the clink, I already knew, right
21 then and there, he threw a gun.

22 Q From the time you approached Mr. Marshall until he tossed
23 the gun, did you ever lose sight of him?

24 A No.

25 Q Who had possession of the gun as you went back to the

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CROSS - OFFICER RANDALL

1 83rd Precinct?

2 A I did.

3 Q What did you do at the 83rd?

4 A I just held it, held it in a paper bag. And later that
5 night, I went back to the 77 Annex, which is our base, and
6 awaited ECT.

7 Q What did you do with the gun the next morning?

8 A The next morning, ECT finally showed up. And I basically
9 just handed off the gun to them where they did their tests.

10 Q Did there come a time when you prepared an arrest report?

11 A Yes.

12 Q Can you explain how that works? Do you prepare it on
13 your own?

14 A Actually, there was three of us. There was Officer Fox,
15 Burbidge and myself. And we share the work. There were many
16 forms. And we also had to do fingerprinting, photographs,
17 faxing and all this other stuff. So we all took -- we all
18 helped each other, you know, to do the report -- to do the
19 reports.

20 Q Did there come a time when you had a conversation with
21 the assistant district attorney concerning the circumstances
22 of Plaintiff's arrest?

23 A Yes.

24 Q How many times did you speak with the ADA?

25 A Once.

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CROSS - OFFICER RANDALL

1 Q When you spoke with the ADA, did you tell the ADA the
2 truth?

3 A Yes.

4 Q Did you testify before the grand jury in the criminal
5 case?

6 A Yes.

7 Q Did you testify truthfully?

8 A Yes.

9 MS. GROSS: Thank you, Officer. I have no further
10 questions.

11 THE COURT: Thank you.

12 MS. CASTRO: Your Honor, I just want to make sure,
13 for the record, that Exhibits F1, D1 and C1 were received into
14 evidence.

15 THE COURT: Yes, they are in evidence.

16 DIRECT EXAMINATION

17 BY MR. NORINSBERG

18 Q Good afternoon, Officer Randall.

19 A Hello.

20 Q You testified a few moments ago that you placed
21 Mr. Marshall in handcuffs; is that correct?

22 A Yes.

23 Q You also placed Mr. Meade in handcuffs at the scene;
24 didn't you?

25 A No.

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REDIRECT - OFFICER RANDALL

1 Q Is it your testimony Mr. Meade was never placed in
2 handcuffs at the scene?

3 A No. I just said that I didn't put him in handcuffs.

4 Q Is it your testimony that he was or wasn't in handcuffs,
5 Mr. Meade?

6 A I don't remember.

7 Q Would you agree that after you got out of the car, you
8 and your fellow officers put handcuffs, not just on
9 Mr. Marshall, but also on Mr. Meade at the same time, true?

10 A I don't agree to that, no.

11 Q At that point in time, you weren't sure which one of
12 these men threw a gun, and that's why you handcuffed both of
13 them, true?

14 A No.

15 Q There would be no reason to handcuff Mr. Meade if you
16 clearly saw Mr. Marshall throwing the gun, right?

17 A Not necessarily.

18 Q Would you agree --

19 MS. GROSS: Your Honor, your Honor, objection. I
20 ask that the witness be able to finish his answer.

21 THE COURT: Did you want to continue?

22 THE WITNESS: Just because he didn't throw a firearm
23 doesn't mean that he shouldn't be handcuffed.

24 BY MR. NORINSBERG

25 Q Now, as you sit here today, is it your memory that he was

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REDIRECT - OFFICER RANDALL

1 handcuffed, Mr. Meade; yes or no?

2 A No.

3 Q You don't remember?

4 A No, I don't remember.

5 Q Now, you testified a few moments ago that when you saw
6 Mr. Marshall, his eyes started bulging, right?

7 A Yes.

8 Q Is that your testimony?

9 A Yes, sir.

10 Q You saw that from almost 150 feet away; is that correct?

11 A What could have been up to 150 feet away.

12 Q At least 100 feet away, maybe even 150 feet away at
13 night, you saw his eyes bulging, right?

14 A There was ample streetlight. Yes.

15 Q And you were in an unmarked police car. You hadn't put
16 your lights and sirens on. You hadn't done anything to notify
17 them you were the police, but it's your testimony that as soon
18 as he saw your car, he froze and his eyes started bulging,
19 right?

20 A Yes.

21 Q Now, you testified a few moments ago that where
22 Mr. Marshall was on that photograph, you testified it was
23 directly under that street lamp; is that correct?

24 A When he threw the gun on the ground, yes.

25 Q But at your deposition, you said you couldn't recall

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REDIRECT - OFFICER RANDALL

1 where the nearest street lamp was, right?

2 A That's because I went back to that spot.

3 Q And that helped refresh your memory for your testimony
4 here today; is that correct?

5 A As far as the lighting, yes.

6 Q Now, when exactly did you go back to that spot?

7 A The day that picture was taken.

8 Q So after your deposition, did you go back to make sure
9 your testimony was correct?

10 A No.

11 Q Now, you also testified there was no van on the street;
12 is that correct?

13 A Yes.

14 Q Are you aware of the fact that Officer Burbridge has
15 testified that there was a van on the street?

16 A No, I don't know what he testified to.

17 Q And you testified that you filled out many, many forms
18 that night; is that correct?

19 A We, as a team, filled out many forms, yes.

20 Q But you, as the arresting officer, only filled out three
21 forms; the arrest report, the complaint report and the memo
22 book entry, correct?

23 A Well, I definitely filled out the memo book entry. But
24 as far as the complaint report and the arrest report, I
25 definitely reviewed it, but I didn't necessarily do it myself.

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REDIRECT - OFFICER RANDALL

1 Q Okay, Officer Randall. Can we agree that at your
2 deposition, you said under oath that you, yourself, prepared
3 those reports? Can we agree on that?

4 A No. I said I did it, but I didn't say I did it myself.
5 That wasn't made clear.

6 Q So when you said you did it, you didn't mean that you,
7 yourself, did it?

8 A I should've said we did it.

9 Q You should've said that, but you didn't, right?

10 A Yes, sir.

11 Q Now, I notice you keep referring to Mr. Meade as the
12 associate of Mr. Marshall; is that correct?

13 A Yes.

14 Q You said that you never met Mr. Marshall before, right?

15 A No.

16 Q You didn't know anything about Mr. Marshall's dealings
17 with this gentlemen on the street, Demetrios Meade, correct?

18 A No.

19 Q You're just using the word "associate" because you sat
20 here during opening and heard your lawyer use that word, true?

21 MS. GROSS: Objection.

22 THE WITNESS: No. I said it because I saw them
23 talking, so he was associating with him.

24 BY MR. NORINSBERG

25 Q Those were your words and had nothing to do with the

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REDIRECT - OFFICER RANDALL

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1 opening statement you heard?

2 A No. If you're not a friend, you're an associate. It's
3 just a common word I use.

4 Q Now, lastly, Officer, you gave testimony about regard to
5 where you first observed Mr. Marshall.

6 And you indicated that on the photograph; is that
7 correct?

8 A Yes, sir.

9 Q And according to your testimony, the police vehicle made
10 a left onto Park Street; is that correct?

11 A Yes.

12 Q Are you aware of the fact that according to Officer
13 Burbridge, the police vehicle was going the other direction on
14 Broadway and made a right onto Park Street? Are you aware of
15 that?

16 MS. GROSS: Objection. Objection.

17 THE COURT: I'll allow the question.

18 THE WITNESS: Yes.

19 MR. NORINSBERG: Nothing further.

20 THE COURT: Thank you, sir. Call the next witness,
21 please.

22 MR. NORINSBERG: At this point, the Plaintiff calls
23 Defendant, Michael Burbridge, to the stand.

24 THE COURT: Swear the witness, please.

25 MICHAEL BURBRIDGE, having first been duly sworn, was examined

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REDIRECT - OFFICER RANDALL

1 and testified as follows:

2 THE CLERK: Please state and spell your name for the
3 court reporter.

4 THE WITNESS: Police Officer Michael Burbridge,
5 M-I-C-H-A-E-L, B-U-R-B-R-I-D-G-E.

6 DIRECT EXAMINATION

7 BY MR. NORINSBERG

8 Q Good afternoon, Officer Burbridge.

9 A Good afternoon.

10 Q You are here pursuant to a subpoena; is that correct?

11 MS. CASTRO: Objection.

12 THE COURT: Objection? Why?

13 MS. CASTRO: He's here as a defendant.

14 MR. NORINSBERG: He was served with a subpoena.

15 THE COURT: Did you serve the subpoena?

16 MR. NORINSBERG: Yes.

17 THE COURT: Overruled.

18 BY MR. NORINSBERG

19 Q You were served with a subpoena to be here; is that
20 correct?

21 A I don't recall a subpoena.

22 Q Now, you're one of the defendants in this case, correct?

23 A That's correct.

24 Q And you have previously given sworn testimony relating to
25 this incident, true?

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DIRECT - OFFICER BURBRIDGE

1 A That's true.

2 Q You gave testimony at a grand jury proceeding, correct?

3 A Yes.

4 Q And you gave testimony at a deposition, right?

5 A Yes.

6 Q And before coming here today, you reviewed your prior
7 testimony, right?

8 A That's correct.

9 Q You wanted to make sure it was fresh in your memory,
10 correct?

11 A That's correct.

12 Q Now, you've been with the NYPD almost eight years,
13 correct?

14 A A little over seven now, yes.

15 Q And your command is Brooklyn North anti-crime?

16 A Not anymore.

17 Q Okay. But as of March of 2008, was that your command?

18 A Yes, it was.

19 Q And you actually had first joined the Brooklyn anti-crime
20 unit in March of 2008, right?

21 A That's correct.

22 Q So at the time of the incident, you had been working in
23 that unit for only two months, true?

24 A True.

25 Q Now, you were working on the night of May 15th, 2008,

A1066

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DIRECT - OFFICER BURBRIDGE

1 right?

2 A Yes.

3 Q And your tour was 5:30 p.m. to 2:05 a.m., right?

4 A Yes.

5 Q You had a partner with you that night, right?

6 A Two partners.

7 Q One of your partners was Officer Fox, and the other one
8 was Officer Randall, right?

9 A Yes.

10 Q There was no other police officer in that car, correct?

11 A That's correct.

12 Q Now, Officer Fox was actually your regular partner,
13 right?

14 A That's correct.

15 Q You had been partners with him before May 15th, 2008,
16 right?

17 A Yes.

18 Q And you had been partners with Randall prior to May 15th,
19 2008, as well, right?

20 A Limited number of times.

21 Q But the answer would be yes, right?

22 A Yes.

23 Q You were all in this unmarked police vehicle, right?

24 A Yes, we were.

25 Q And you, yourself, were actually in the front passenger

A1067

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DIRECT - OFFICER BURBRIDGE

1 seat of that vehicle, right?

2 A Yes.

3 Q And Officer Fox was driving, right?

4 A Yep.

5 Q You were on Broadway heading northwest towards Manhattan;
6 is that correct?

7 A Yes, I was.

8 Q You were doing patrol at that time?

9 A Yes.

10 Q And there came a time when you stopped two individuals
11 walking on Park Street in Brooklyn, right?

12 A Yes.

13 Q And you learned the names of those individuals
14 eventually, right?

15 A Yes, I did.

16 Q One was Joshua Marshall, the other was Demetrios Meade,
17 right?

18 A That's correct.

19 Q When you first observed Mr. Marshall and Mr. Meade, they
20 were on Broadway; is that correct?

21 A Yes, it is.

22 Q They were on Broadway walking in the direction of
23 Manhattan; is that correct?

24 A That's correct.

25 Q And you saw them before you reached the intersection,

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DIRECT - OFFICER BURBRIDGE

1 right?

2 A Yes, I did.

3 Q And then shortly after you saw Mr. Marshall, you made a
4 decision to stop these two; is that correct?

5 A Yes.

6 Q And would you agree, Officer Burbridge, that it was only
7 a matter of seconds from the time you first saw Mr. Marshall
8 until the time you stopped him?

9 A Yes.

10 Q Now, you're familiar about what's known as furtive
11 movements, right?

12 A That's correct.

13 Q Furtive movements would be something of a suspicious
14 movement, right?

15 A That's correct.

16 Q Furtive movements would be an evasive movement, right?

17 A That's correct.

18 Q Can you please tell the members of this jury, did you
19 observe any furtive movements by Mr. Marshall before you
20 decided to stop him?

21 MS. CASTRO: Objection. Your Honor, the stop is not
22 in question. Further, counsel is diving into questions that
23 are inappropriate.

24 THE COURT: You may continue. Overruled.

25 THE WITNESS: I'm sorry, could you restate that.

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DIRECT - OFFICER BURBRIDGE

1 BY MR. NORINSBERG

2 Q Prior to the time that you saw Mr. Marshall, did you
3 observe any furtive movements before you decided to stop him?

4 A Can you rephrase it.

5 MR. NORINSBERG: Strike it.

6 BY MR. NORINSBERG

7 Q Prior to the time that you decided to stop Mr. Marshall,
8 had you observed suspicious movements?

9 A Yes.

10 Q Referring to your deposition on Page 66, Line 23,
11 "QUESTION: Did you observe any furtive movements by Joshua
12 Marshall before you decided to stop him?

13 "ANSWER: No."

14 MS. CASTRO: Objection. I also note there's an
15 objection at the deposition to that question also.

16 THE COURT: Overruled.

17 BY MR. NORINSBERG

18 Q Do you recall being asked that question and giving that
19 answer?

20 A Yes.

21 Q You remember that?

22 A Yes.

23 Q So according to your deposition testimony, you did not
24 observe any suspicious movements by Mr. Marshall before you
25 decided to stop him; true or not true?

A1070

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DIRECT - OFFICER BURBRIDGE

1 MS. CASTRO: Objection.

2 THE COURT: Overruled.

3 MS. CASTRO: Your Honor, this pertains to your
4 Honor's in limine rulings.

5 THE COURT: The reference is to the night from the
6 time of first observation to the time of arrest; is that
7 correct?

8 MR. NORINSBERG: Yes.

9 MS. CASTRO: Your Honor, may we be heard at sidebar?

10 THE COURT: You may not.

11 MS. CASTRO: Your Honor, I just note my objection
12 that counsel's question --

13 THE COURT: Your objection is always noted. We have
14 a full-time reporter. Proceed with the questioning.

15 BY MR. NORINSBERG

16 Q Now, before you decided to stop Mr. Marshall, you hadn't
17 activated your sirens at that point, correct?

18 A That's correct.

19 Q You hadn't activated your flashing lights, correct?

20 A That's correct.

21 Q You hadn't yelled out, "Stop, police," or words to that
22 effect; is that right?

23 A That's correct.

24 Q You hadn't made any effort to stop these two individuals;
25 is that correct?

A1071

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DIRECT - OFFICER BURBRIDGE

1 A That's correct.

2 Q Did you see Mr. Marshall's eyes bulging as he was walking
3 down the street?

4 A I don't remember them bulging.

5 Q Did you see him suddenly stop in his tracks and look
6 scared when he saw your police car?

7 A Yes.

8 Q You saw that, right?

9 A Yes, I did.

10 Q Even though you said in your deposition you didn't
11 observe anything suspicious, right?

12 MS. CASTRO: Objection.

13 BY MR. NORINSBERG

14 Q Now, after you saw Mr. Marshall, the police vehicle made
15 a right onto Park Street, isn't that true?

16 A That's true.

17 Q So you were here just a few moments before when Officer
18 Randall was giving his testimony, correct?

19 A That's correct.

20 Q And you saw Officer Randall explain to the jury where
21 things were on that photograph, correct?

22 A That's correct.

23 Q And you saw Officer Randall say that the police vehicle
24 actually was coming from the other side of Broadway and made a
25 left onto Park Street, true?

A1072

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DIRECT - OFFICER BURBRIDGE

1 A He said that, but that's not what I'm saying right now.

2 Q So your version of where the police vehicle was right
3 before the stop is different than what we heard a few moments
4 ago from the Defendant, Officer Randall; is that true?

5 A I remember what I saw.

6 Q It's different than what you just heard, correct?

7 A Maybe.

8 Q Now, Park Street is a one-way street, right?

9 A That's correct.

10 Q So when you made this right onto Park Street, you're
11 going down a one-way street the wrong way, correct?

12 A That's correct.

13 Q You were completely blocking oncoming traffic, right?

14 A I don't know if there was traffic.

15 Q Any traffic that would've been coming in your direction
16 would be blocked by the police vehicle, right?

17 A That's correct.

18 Q And you did this, you made this right turn down the
19 one-way street the wrong way so you could stop Mr. Marshall,
20 right?

21 A So I could talk to Mr. Marshall.

22 Q You hadn't heard any words between Mr. Marshall and
23 Mr. Meade, right?

24 A That's correct.

25 Q But as far as you were concerned, this was an urgent

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DIRECT - OFFICER BURBRIDGE

1 situation, right?

2 A Yes, it was.

3 Q You needed to conduct a general, street-level
4 investigation.

5 That's your testimony, right?

6 A That is correct.

7 Q You felt it needed immediate action, right?

8 A Yes, it did.

9 Q And can you please tell the jury exactly what questions
10 were you planning on asking Mr. Marshall when you stopped him.

11 A Just a general investigation to see where they were
12 coming from, where they were going to.

13 Q Referring to your deposition, Page 84, Line 10,
14 "QUESTION: Let's say Joshua Marshall said sure. What were
15 you planning on asking him?

16 "ANSWER: I don't know. I could not tell you."

17 Do you recall being asked that question and giving
18 that answer at your deposition?

19 A Yes.

20 Q So even though this was an urgent situation and you made
21 a turn down a one-way street the wrong way, you didn't know
22 what you were going to ask him, right?

23 A You can ask him anything you want.

24 Q And then, when you actually approached Mr. Marshall, they
25 were walking on the right side of Park Street, right?

A1074

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DIRECT - OFFICER BURBRIDGE

1 A That's correct.

2 Q And at that point, your police vehicle made a right turn
3 and went down Park Street?

4 A As they were walking down Park, yes, we made a right.

5 Q You're in a vehicle and they're walking, right?

6 A That's correct.

7 Q So you caught up with them very quickly, right?

8 A Yes.

9 Q And at that moment in time, you said, "Sir, may we please
10 have a moment of your time?"

11 That's what you asked him, right?

12 A In context, yes.

13 Q What do you mean "in context"? That's what you asked
14 him, right?

15 A Something along the lines, of, "Hey, police, can we have
16 a moment of your time," not in such a low voice, but as to a
17 voice where he can hear me, "Police, can we have a moment of
18 your time."

19 Q And that was just to do this street-level investigation,
20 right?

21 A That's correct.

22 Q And as far as you were concerned, Officer, up until that
23 point, if these two men didn't want to stop and answer
24 questions, that would've been it. It would've been over,
25 right?

A1075

DIRECT - OFFICER BURBRIDGE

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1 A That's correct.

2 Q Now, would it be fair to say that you were still inside
3 your police vehicle when you first addressed Mr. Marshall?

4 A Yes.

5 Q And when you addressed him and asked him to please give
6 you a moment of his time, he didn't respond to you.

7 Is that your testimony?

8 A Yes.

9 Q And you didn't ask any additional questions, right?

10 A No.

11 Q And once you asked this question, Mr. Meade stopped
12 walking, right?

13 A Yes.

14 Q But your testimony is that Mr. Marshall continued walking
15 forward, right?

16 A That's correct.

17 Q Now you were here when Officer Randall testified a few
18 moments back, right?

19 A Yes.

20 Q You heard Officer Randall testify that actually, what
21 happened is Mr. Marshall went backwards, right? Did you hear
22 that?

23 A I heard that, yes.

24 Q Would you agree that the testimony you just gave is
25 inconsistent with the testimony Officer Randall just gave?

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DIRECT - OFFICER BURBRIDGE

1 MS. CASTRO: Objection.

2 THE COURT: Sustained.

3 BY MR. NORINSBERG

4 Q Would you agree that your testimony is moving forward,
5 not backwards, right?

6 A Yes.

7 Q So Mr. Marshall would be ahead of Mr. Meade on this
8 sidewalk, correct?

9 A He was.

10 Q And it's at that point, Officer Burbridge, you claim that
11 you saw Mr. Marshall reach into his waistband and pull out the
12 gun; is that right?

13 A That's correct.

14 Q You saw this with your own eyes, right, Officer?

15 A Yes, I did.

16 Q And as a police officer, you're trained to make careful
17 observations, right?

18 A Yes, I am.

19 Q That's part of the job, right?

20 A Yes.

21 Q Can you please tell the members of this jury, did
22 Mr. Marshall pull out the gun with his right hand or his left
23 hand?

24 A I'm not sure.

25 Q Did he pull it from the right side of his waistband or

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DIRECT - OFFICER BURBRIDGE

1 the left side?

2 A It's from the center, from what I remember.

3 Q It was from the center?

4 A Yes.

5 Q Referring to your deposition, Page 35, Line 14,

6 "QUESTION: Did he pull out the gun from his right-side

7 waistband or his left-side waistband? ANSWER: I don't

8 recall."

9 Do you recall giving that testimony?

10 A Yes.

11 Q So at your deposition, you couldn't remember that

12 important detail, could you?

13 A I guess not.

14 Q But you told us a minute ago the police are trained to

15 make these observations, right?

16 A We are.

17 Q Now, Mr. Marshall was approximately 10 feet away from

18 your police car when he allegedly threw this gun; is that

19 correct, Officer?

20 A Yes.

21 Q 10 feet ahead of where you were, right?

22 A On an angle away from the vehicle.

23 Q He was 10 feet further down the road on Park Street than

24 where you were, right?

25 A He wasn't 10 feet further down the road. He was 10 feet

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DIRECT - OFFICER BURBRIDGE

1 on an angle away from where I was seated.

2 Q Would you agree that if you were inside of a police
3 vehicle and you were 10 feet away from him --

4 A Yes.

5 Q -- you certainly didn't step out in front of him in the
6 street, did you?

7 A No.

8 Q Do you recall testifying in front of a grand jury on this
9 case?

10 A Yes, I do.

11 Q You knew when you testified in front that grand jury that
12 it was critical for you to tell the truth?

13 A Yes.

14 Q You knew that you could be sending this man to jail for
15 several years, right?

16 A Yes.

17 Q Do you recall telling the grand jury under oath that you
18 actually stepped in front of Mr. Marshall as he was tossing
19 the gun?

20 A Yes. If it's there, that's what I said.

21 Q Well, Officer, if you're 10 feet away inside of a police
22 car, how, at the same time, could you be out on the street
23 stepping in front of Mr. Marshall when he throws the gun? How
24 is that possible?

25 A I wasn't in front of him like that, but it could be if

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DIRECT - OFFICER BURBRIDGE

1 he's that way. If he faces me at one point, he could in front
2 of me.

3 Q You told the grand jury, "I stepped in front him when he
4 threw the gun," right?

5 A I didn't step in front of him because he was 10 feet away
6 down the block. How is that possible? You tell me.

7 Q That's what I'm asking you. I'm asking you: How is that
8 possible?

9 A It's not.

10 Q Would you agree that your testimony at the deposition
11 when you said you were inside the vehicle 10 feet away is
12 completely inconsistent with the idea of being out of the
13 vehicle on the street and stepping in front of him?

14 A It's not inconsistent at all.

15 Q So those two are perfectly consistent?

16 A They could be.

17 Q Remember, referring to your deposition -- strike that.

18 Referring to your grand jury testimony, Page 5, Line
19 21, "QUESTION: And what did you do after you observed that
20 individual?

21 "ANSWER: I asked the individual for a moment of
22 time, at which point, as I stepped in front of him, I observed
23 Mr. Marshall remove what appeared to be a silver firearm from
24 his waist and throw it under the vehicle."

25 Do you remember being asked that question and giving

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DIRECT - OFFICER BURBRIDGE

1 that answer at the grand jury?

2 A Yes, I guess.

3 Q You never actually stepped in front of Mr. Marshall on
4 the street, did you?

5 A No, I did not.

6 Q In fact, the truth is, Officer, you were still inside the
7 car when the gun was thrown, true?

8 A It was either at a point when I was halfway in or halfway
9 out of the vehicle.

10 Q You got out of the car only after the gun was thrown,
11 true?

12 A It's a matter of seconds. It could have been -- if I was
13 in the car or outside of the car, but I saw it.

14 Q Referring to your deposition, Page 40 Line 17, "QUESTION:
15 As you sit here today, do you have a specific memory of
16 getting out of the car before the gun was thrown?

17 "ANSWER: Before the gun was thrown?

18 "QUESTION: Yes.

19 "ANSWER: No."

20 Page 41, Line 9, "QUESTION: Had you made a decision
21 to get out of the vehicle before the gun was thrown?

22 "ANSWER: No."

23 Do you recall being asked those questions and giving
24 those answers at your deposition?

25 A Yes.

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DIRECT - OFFICER BURBRIDGE

1 Q So at your deposition, you had no memory of actually
2 getting out of the car before the gun was thrown, true?

3 A I'm sorry, rephrase that.

4 Q At your deposition, you had no recollection of actually
5 getting out of the car before the gun was thrown, right?

6 A Yes.

7 Q Now, the gun was in the air for a split second, right?

8 A That's correct.

9 Q And the gun actually landed on the street in a space
10 between a van and a curb, true?

11 A That's true.

12 Q Now you heard Officer Randall testify before?

13 A Yes.

14 Q You heard him testify that that minivan wasn't there,
15 right?

16 A Yes.

17 Q And you heard him testify that it was just regular cars
18 there, right?

19 A That's correct.

20 Q And that because it was just regular cars, he had a clear
21 vantage point to that, right?

22 A That's correct.

23 Q But, in fact, there was a van there, right?

24 A Yes, there was.

25 Q So the van was blocking your view, wasn't it?

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DIRECT - OFFICER BURBRIDGE

1 A No, it wasn't.

2 Q Would you agree that you still might have been inside the
3 car even when the gun landed?

4 A Can I make myself clear, your Honor?

5 THE COURT: I'm sorry?

6 THE WITNESS: Can I make myself clear about the van
7 situation?

8 MS. CASTRO: Objection, your Honor. It was asked
9 and answered.

10 THE COURT: Are you objecting to the witness?

11 MS. CASTRO: I'm objecting to counsel's question.

12 THE COURT: Yes, you can try to explain it.

13 THE WITNESS: In the current photo of the scene, the
14 van in which I'm referring to, which is where the gun was
15 recovered, was actually situated behind the van in the photo.
16 So if you see -- look at the photo, there's a police car in
17 the photo. That's where the van would've been. Where the gun
18 was thrown was on an angle away from us, but towards the
19 street, therefore landing by the van that was basically where
20 that police car is.

21 BY MR. NORINSBERG

22 Q You agree there is a van on the street?

23 A I do.

24 Q In the location where the gun was thrown, right?

25 A Yes.

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DIRECT - OFFICER BURBRIDGE

1 Q You agree that you were actually still inside the car
2 when the gun actually landed? Do you agree with that?

3 A Maybe it was in, maybe I was out. Split second.

4 Q Well, after the gun was thrown, you got out of the car,
5 right?

6 A Yes. Yes.

7 Q And then, you told both of the men to get against the
8 wall, right?

9 A That's correct.

10 Q And then, you put both of the men in handcuffs, true?

11 A I don't know if I personally did, but I believe both were
12 in handcuffs.

13 Q Both men were placed in handcuffs at some point very
14 shortly after you got out of the car, right?

15 A Yes, they were.

16 Q And when they were in handcuffs standing there against
17 the wall, you asked whose gun is it, true?

18 A No.

19 Q And then, your fellow officers asked them whose gun is
20 it, true?

21 A No.

22 Q You do agree Officer Randall and Officer Fox were present
23 at the scene, right?

24 A That's correct.

25 Q You agree that your fellow officers may have been asking

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DIRECT - OFFICER BURBRIDGE

1 some questions at that point in time, true?

2 A They may have.

3 Q And you don't remember exactly what they were asking, do
4 you?

5 A No, I don't.

6 Q Now, Mr. Marshall was charged with criminal possession of
7 a weapon; is that right?

8 A That's correct.

9 Q And one way to show that Mr. Marshall had possession of
10 this weapon, this gun, is to see if there are fingerprints on
11 the gun, right?

12 A That's correct.

13 Q To your knowledge, Officer Burbbridge, were Joshua
14 Marshall's fingerprints ever found on this gun, yes or no?

15 A To my knowledge, no.

16 Q Would you agree, Officer, that it's standard police
17 procedure to perform fingerprint tests anytime a gun is
18 recovered?

19 MS. CASTRO: Objection.

20 THE COURT: You may answer.

21 THE WITNESS: Okay. It's not all the time, but most
22 of the time, yes.

23 BY MR. NORINSBERG

24 Q To your knowledge, Officer Burbbridge, were fingerprint
25 tests done on this gun?

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DIRECT - OFFICER BURBRIDGE

1 A To my knowledge, yes, they were.

2 Q Referring to your deposition, Page 51, Line 20,

3 "QUESTION: To your knowledge, were any fingerprint tests ever
4 done in this case?

5 "ANSWER: To my knowledge, I'm not sure if they were
6 or not."

7 Do you recall giving that testimony?

8 A Yes.

9 Q So at your deposition about a year ago, you weren't sure
10 whether the fingerprint test had ever been done, right?

11 A Then, I wasn't sure. Now, I am.

12 Q Now you are, a year later?

13 A Yes.

14 Q So is your memory of this incident better now than it was
15 one year ago when you gave your sworn deposition testimony?

16 A Yes. I was just sitting here when Randall said there
17 were fingerprint tests done. So how am I to say that now I
18 don't know, when it was clearly brought out in court saying
19 there were fingerprint tests done?

20 Q So you wouldn't want to contradict what Officer Randall
21 said?

22 MS. CASTRO: Objection.

23 THE COURT: Sustained.

24 BY MR. NORINSBERG

25 Q Now, when you recovered this gun, it actually had a

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DIRECT - OFFICER BURBRIDGE

1 cartridge inside it, correct?

2 A It had many cartridges.

3 Q And the cartridges are where the bullets are housed,
4 right?

5 A That's correct.

6 Q So somebody, some human being had to place those bullets
7 into the cartridges, right?

8 A That's correct.

9 Q There were six bullets that were placed into the
10 cartridges, right?

11 A Yes.

12 Q To your knowledge, were any of those bullets ever
13 fingerprint tested?

14 A I don't know. I would assume they were. It's not my
15 field.

16 Q To your knowledge, were any fingerprint tests ever done
17 on the cartridges themselves?

18 A I wouldn't know that.

19 Q Now, to your knowledge, were Demetrios Mead's
20 fingerprints ever found on that gun?

21 A To my knowledge, no.

22 Q Did anyone ever test to see if Mr. Meade's fingerprints
23 were on that gun?

24 MS. CASTRO: Objection.

25 THE COURT: If you know, you may answer.

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DIRECT - OFFICER BURBRIDGE

1 THE WITNESS: I have no idea.

2 BY MR. NORINSBERG

3 Q You have no idea?

4 A No.

5 Q Now, going back to the scene, after you retrieved the
6 gun, you checked to see if it was loaded?

7 A That's correct.

8 Q You saw that it was loaded. You saw the bullets that we
9 saw in that photograph before, is that correct?

10 A I didn't see a photograph before.

11 Q You did see that the gun was loaded and it had bullets,
12 right?

13 A Yes.

14 Q Then you removed the bullets and gave it to PO Randall,
15 right?

16 A That's correct.

17 Q Now, Officer, this wasn't the first time that you
18 recovered a gun during an arrest, right?

19 A No.

20 Q You've recovered many guns while working in the
21 anti-crime unit, right?

22 A That's correct.

23 Q So you're familiar with the process of preserving
24 evidence and making sure that you don't compromise the
25 evidence in any way, right?

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DIRECT - OFFICER BURBRIDGE

1 A Yes.

2 Q Can you tell the members of this jury, what steps did you
3 take to make sure that you did not leave your own fingerprints
4 on the gun?

5 A I don't recall taking any steps. I remember just giving
6 the gun to Officer Randall.

7 Q And after you gave it to him, do you have any idea what
8 happened to it?

9 A No.

10 Q Now, Officer Randall was actually the arresting officer,
11 right?

12 A That's correct.

13 Q He's the one that actually placed Mr. Marshall under
14 arrest, right?

15 A I'm not sure if he was or not.

16 Q Referring to your deposition, Page 60 Line 21.

17 "QUESTION: Who actually placed Joshua Marshall under arrest?

18 "ANSWER: Officer Randall."

19 Do you recall being asked that question and giving
20 that answer?

21 A Yes.

22 Q So at your deposition, you remembered that it was Officer
23 Randall who actually placed Joshua Marshall under arrest,
24 correct?

25 A Yes.

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DIRECT - OFFICER BURBRIDGE

1 Q But you were the first one who observed Mr. Marshall,
2 right?

3 A That's correct.

4 Q You were the first one who spoke to Mr. Marshall, right?

5 A That's correct.

6 Q You were the one that actually decided to stop
7 Mr. Marshall, right?

8 A That's correct.

9 Q You were the one that actually recovered the firearm from
10 the street?

11 A That's correct.

12 Q Yet it was Officer Randall who was made the arresting
13 officer?

14 A That's correct.

15 Q And the reason why he was made the arresting officer was
16 it was his turn to get the arrest, right?

17 A That's correct.

18 Q Now Officer Randall was sitting in the back seat of the
19 car; is that correct?

20 A Yes, he was.

21 Q Officer Randall was sitting behind the driver, right?

22 A That's correct.

23 Q To your knowledge, Officer Burbbridge, did Officer Randall
24 ever see Mr. Marshall remove the gun from his waistband?

25 MS. CASTRO: Objection.

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DIRECT - OFFICER BURBRIDGE

1 THE COURT: Sustained.

2 BY MR. NORINSBERG

3 Q Now, before stopping Mr. Marshall, you hadn't made any
4 arrests that night, correct?

5 A That's correct.

6 Q You hadn't issued any summons that night before stopping
7 Mr. Marshall, right?

8 A That's correct.

9 Q After this incident, you filled out what's called a
10 stop-and-frisk form; is that right?

11 A That is correct.

12 Q I'm anything to show you what's been marked as
13 Plaintiff's Exhibit 11.

14 Do you recognize this document?

15 A Yes, I do.

16 Q Is this the stop-and-frisk form that you filled out for
17 Mr. Marshall?

18 A Yes, it is.

19 Q And is your handwriting on that document?

20 A Yes, it is.

21 MR. NORINSBERG: I offer this document as evidence.

22 THE COURT: Admitted.

23 (Plaintiff's Exhibit 11 was received in evidence, as
24 of this date.)

25 BY MR. NORINSBERG

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DIRECT - OFFICER BURBRIDGE

1 Q Now, you were careful when you filled out this
2 stop-and-frisk report, correct?

3 A Yes.

4 Q You wanted to include as much pertinent information as
5 possible, right?

6 A Yes.

7 Q Now, do you see on this form, there's a section that
8 talks about what circumstances led to the stop? Do you see
9 that?

10 A Yes.

11 Q And the form lists a number of categories, correct?

12 A Yes, it does.

13 Q And you checked off "furtive movements"; is that correct?

14 A Yes, I did.

15 Q So according to your report, you saw Mr. Marshall make
16 furtive movements prior to the stop, right?

17 A Yes.

18 Q In fact, Officer, you didn't observe any furtive
19 movements by Mr. Marshall before you decided to stop him; did
20 you?

21 MS. CASTRO: Objection.

22 THE WITNESS: I'm sorry. Can you restate that.

23 BY MR. NORINSBERG

24 Q In fact, Officer Burbridge, you didn't observe any
25 furtive movements by Mr. Marshall before you decided to stop

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DIRECT - OFFICER BURBRIDGE

1 him?

2 A That's incorrect.

3 Q Referring to your deposition, Page 66 Line 23, "QUESTION:
4 Did you observe any furtive movements by Joshua Marshall
5 before you decided to stop him?

6 "ANSWER: No."

7 Do you recall being asked that question and giving
8 that answer?

9 MS. CASTRO: Objection, your Honor. Again, I note
10 that there was an objection at the deposition. This is
11 mischaracterizing the officer's deposition testimony.

12 THE COURT: Overruled.

13 BY MR. NORINSBERG

14 Q Do you recall being asked that question and giving that
15 answer?

16 A Can you say that again a little slower.

17 Q Do you recall being asked the following question and
18 giving the following answer, 66, Line 23: "QUESTION: Did you
19 observe any furtive movements by Joshua Marshall before you
20 decided to stop him?

21 "ANSWER: No."

22 Do you recall giving that testimony, Officer?

23 A Yes.

24 Q Now, according to your stop-and-frisk form, you did
25 observe furtive movements, right?

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DIRECT - OFFICER BURBRIDGE

1 A Yes, I did.

2 Q But according to what I just read in your deposition, you
3 didn't, right?

4 A That's correct.

5 MS. CASTRO: Objection again, your Honor. Counsel
6 has mischaracterized the deposition testimony. The question
7 right before indicates the furtive movements.

8 THE COURT: Read the one before too, please.

9 BY MR. NORINSBERG

10 Q Reading from Page 66, Line 19, "QUESTION: So, Joshua
11 Marshall signaling to Demetrios Meade to come this way, in
12 your mind, was a furtive movement?

13 "ANSWER: Yes."

14 Do you recall giving that testimony?

15 A Yes, I do.

16 Q So you consider that to be a furtive movement?

17 A Yes. That plus other factors.

18 Q Would you agree that if one citizen on a street motions
19 to another citizen on the street, that's not a basis to stop
20 them, is it?

21 A No.

22 Q You agree with that, right?

23 A I agree with that.

24 Q Now, on your form, towards the bottom left of the
25 document, it says, "Did officer explain reason for stop?"

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DIRECT - OFFICER BURBRIDGE

1 Do you see that?

2 A Yes.

3 Q And then, the box is checked yes.

4 Do you see that?

5 A Yes.

6 Q So on this form, you claim that you had actually
7 explained the reasons why you stopped; is that correct?

8 A Yes.

9 Q But, in fact, Officer, you did not explain the reasons
10 why you wanted to stop Mr. Marshall; did you?

11 A Not at first, no.

12 Q At any point in time, did you explain the reason why you
13 wanted stop Mr. Marshall?

14 A After he was under arrest.

15 Q Referring to your deposition, Page 30, Line 8, "QUESTION:
16 Did there ever come a point in time that night when you
17 explained to Joshua Marshall why you had stopped him?

18 "ANSWER: No."

19 Do you recall giving that testimony?

20 A Yes.

21 Q So according to your sworn deposition testimony, there
22 never came a time at any point that night that you explained
23 to Mr. Marshall why you had stopped him, is that true?

24 A I wouldn't say that's true.

25 MS. CASTRO: Objection, your Honor. Again, the stop

A1095

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DIRECT - OFFICER BURBRIDGE

1 is not at issue.

2 THE COURT: Overruled.

3 BY MR. NORINSBERG

4 Q Is that true?

5 A I'm sorry, say that again.

6 Q According to your deposition testimony, at no point that
7 night did you ever explain to Mr. Marshall the reason why you
8 had stopped him, true?

9 A I wouldn't say that's true.

10 Q According to your testimony, sir, what you said at the
11 deposition.

12 A According to my testimony, but I wouldn't say that's true
13 in general.

14 Q So what your testimony was at the deposition was
15 inaccurate?

16 A I don't believe so but --

17 Q Now on the top of the form in front of you, it says
18 "period of observation prior to the stop."

19 Do you see that?

20 A Yes, I do.

21 Q And the purpose of this section of the form is the police
22 are supposed to put in the period of observation before they
23 made the stop, right?

24 A Yes.

25 Q But on this form, you actually left that box blank; is

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DIRECT - OFFICER BURBRIDGE

1 that correct?

2 A Yes, I did.

3 Q Can you please explain to the members of this jury why
4 you left that portion of this document blank.

5 A I couldn't explain it to you.

6 Q You have no explanation?

7 A No explanation.

8 Q And you had no explanation at your deposition, right?

9 A No.

10 Q Now, apart from filling out this stop-and-frisk form, you
11 didn't fill out any other forms; is that right?

12 A No.

13 Q Being that you were in the passenger seat, you were
14 what's known as a recorder, correct?

15 A That's correct.

16 Q As a recorder, your job is to record what happens in your
17 memo book, correct?

18 A That's correct, but --

19 Q So for example, when you arrest someone, you're supposed
20 to record the specific details relating to that arrest in your
21 memo book, true?

22 A Generally. If you're the arresting officer, you're more
23 likely to do it than the assisting officers.

24 Q Yet, Officer, even though you were the designated
25 recorder that night, you didn't make any memo book entries for

A1097

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DIRECT - OFFICER BURBRIDGE

1 this incident; did you?

2 A No, I didn't. I normally wouldn't.

3 THE COURT: Let's break now. We will be back at
4 five to two. Have your lunch, ladies and gentlemen.

5 (The jury exited.)

6 (Lunch recess was taken.)

7 JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter

8 THE COURT: Is there an application?

9 MS. GROSS: Your Honor, there's a matter that
10 defense counsel would like to raise without the presence of
11 the jury when counsel is present.

12 THE COURT: Go ahead.

13 MS. GROSS: Your Honor, Defendant's position is that
14 the door has been opened with respect to the reasons for the
15 initial stop. There have been a number of questions from
16 Plaintiff's counsel as to the reasons for the initial stop.

17 THE COURT: I'll see you tomorrow at 9:30. Motion
18 denied. Brief it in writing.

19 MS. GROSS: Okay. Your Honor, from our perspective,
20 as the cross and direct continue, Plaintiff's counsel, we ask
21 that they be precluded from referencing --

22 THE COURT: Denied. They haven't opened any door.
23 They've just been referring, as I understand it, I thought it
24 was quite clear, to the period from the time the Defendants
25 first observed the Plaintiff until the arrest.

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DIRECT - OFFICER BURBRIDGE

1 MS. GROSS: Your Honor, we intend to ask for a
2 curative instruction in the morning.

3 (The jury entered.)

4 THE COURT: Proceed, please.

5 MR. NORINSBERG: Yes, your Honor. Thank you.

6 BY MR. NORINSBERG

7 Q Good afternoon, Officer Burbridge.

8 A Good afternoon.

9 Q Officer Burbridge, after this arrest, you had a meeting
10 with prosecutors in the Brooklyn DA's office; is that correct?

11 A That's correct.

12 Q And at that meeting, the prosecutors asked you what had
13 happened, correct?

14 A That's correct.

15 Q And you knew, at that point in time, that it was very
16 important for you to be truthful to the prosecutors, right?

17 A Yes.

18 Q You had to tell them the truth, the whole truth and
19 nothing but the truth, right?

20 A That's correct.

21 Q And you knew there was no room for any dishonesty in that
22 discussion, right?

23 A Yes.

24 Q You also understood that whatever you told the prosecutor
25 could have a direct impact on whether these charges moved

A1099

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DIRECT - OFFICER BURBRIDGE

1 forward, correct?

2 A Yes.

3 Q You knew that the prosecutor wasn't there out on the
4 street when this incident happened, correct?

5 A I'm sorry, could you say that again.

6 Q You understood the D.A. was not out on the street when
7 this incident happened?

8 A Yes, obviously.

9 Q So you knew that the prosecutor would be relying on what
10 you told them, right?

11 A That's correct.

12 Q When you met with that prosecutor, you told them that you
13 actually stepped out in front of the car, stepped out in front
14 of Marshall, and you were looking at him when he tossed the
15 gun, true?

16 A No, it's not true.

17 Q You never said that?

18 A The way you're describing it, no.

19 Q Did you tell the prosecutor that you were 10 feet away
20 inside of a car?

21 A Yes.

22 Q Now, would you agree that whatever statements you made to
23 the D.A. were directly responsible for this case moving
24 forward?

25 A Yes.

A1100

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DIRECT - OFFICER BURBRIDGE

1 Q You also told the D.A. that you saw Marshall take a gun
2 from his waistband, right?

3 A That's correct.

4 Q And you told them you that saw Mr. Marshall throw the
5 gun, right?

6 A That's correct.

7 Q During this meeting with the district attorney, did you
8 also tell them that you observed Mr. Marshall making furtive
9 movements before the stop?

10 A Yes, I did.

11 Q Did you also tell them that you explained to Mr. Marshall
12 the reasons for the stop?

13 A I don't recall.

14 Q At some point after the meeting with the district
15 attorney, you testified before the grand jury, right?

16 A That's correct.

17 Q And you had reviewed your grand jury testimony before
18 your deposition testimony, right?

19 A I'm sorry, say that again.

20 Q You had looked at your prior testimony that you had given
21 at the grand jury before you testified at the deposition in
22 this case, right?

23 A I don't know if it was before or not.

24 Q Do you recall being asked the following question and
25 giving the following answer at your deposition, question --

A1101

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DIRECT - OFFICER BURBRIDGE

1 Page 75 Line 9, "QUESTION: Before coming here today, did you
2 review your grand jury testimony?

3 "ANSWER: Yes, I did."

4 Do you recall that?

5 A If it's there, yes.

6 Q So before you gave your testimony in the deposition, you
7 made sure to be familiar with your prior testimony at the
8 grand jury, right?

9 A I guess I did, yeah.

10 Q Now, you also told the grand jury you had seen Marshall
11 take out the gun from his waistband, right?

12 A That's correct.

13 Q You told them that you saw him throw the gun, right?

14 A That's correct.

15 Q And as a result of your testimony, Mr. Marshall was
16 indicted, right?

17 A That's correct.

18 MS. CASTRO: Objection.

19 THE COURT: Overruled.

20 THE WITNESS: That's correct.

21 BY MR. NORINSBERG

22 Q You're aware, though, that after you testified in the
23 grand jury and after Officer Randall testified, eventually all
24 of these charges were dismissed? You're aware of that, right?

25 A I'm now aware of that, yes.

A1102

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DIRECT - OFFICER BURBRIDGE

1 Q Now, at the time of your depositions, you were still
2 partners with Officer Fox; is that correct?

3 A That's correct.

4 Q Is he still your regular partner?

5 A No.

6 Q But at the deposition he was, right?

7 A That's correct.

8 Q And, in fact, you had a discussion with Officer Fox
9 regarding this lawsuit, didn't you?

10 A You'd have to refresh my memory.

11 Q Referring to your deposition, Page 100, Line 19,
12 "QUESTION: Have you ever had any discussions with Police
13 Officer Fox about the claims in this lawsuit?

14 "ANSWER: Yes."

15 Do you recall being asked that question and giving
16 that answer at your deposition?

17 A Yes. If it's on the paper, yes.

18 Q So you had a discussion with Officer Fox relating to the
19 claims in this lawsuit, right?

20 A Yes.

21 Q And in fact, you had discussions with Officer Fox just
22 one week before you testified at the deposition, true?

23 A I don't recall off the top of my head if it was a week.
24 This was a year ago.

25 Q Same Page 100, Line 23, "QUESTION: When did you have

A1103

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DIRECT - OFFICER BURBRIDGE

1 discussions about this lawsuit with Police Officer Fox?

2 "ANSWER: Not too long ago. Maybe last week."

3 Do you recall being asked that question and giving
4 that answer?

5 A I don't recall, but if it's on the paper, then I did
6 answer it like that. It's a year ago.

7 Q So according to your deposition testimony, you spoke to
8 Officer Fox about the lawsuit just one week before you,
9 yourself, gave your testimony, correct?

10 A According to the deposition, yes.

11 MR. NORINSBERG: Thank you. I have nothing further.

12 CROSS-EXAMINATION BY

13 BY MS. CASTRO

14 Q Good afternoon, Officer.

15 A Good afternoon.

16 Q Officer, I just want to get a little background info from
17 you.

18 First off, how long have you been employed with the
19 New York City Police Department?

20 A A little over seven years now.

21 Q What is your current command?

22 A 90th Precinct detective squad.

23 Q Prior to working on the detective squad, where were you
24 assigned?

25 A Brooklyn North anti-crime unit.

A1104

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CROSS - OFFICER BURBRIDGE

1 Q For how long?

2 A Four years.

3 Q What were your duties and responsibilities in the
4 anti-crime unit?

5 A Plain-clothes unit, you deal with street-level violence,
6 including robberies, shootings, weapons possession on a street
7 level when they happen, when they occur.

8 Q Now, Officer, how many arrests have you made in the
9 course of your career?

10 A Approximately 210.

11 Q And how many arrests, approximately, have you been
12 involved in?

13 A Four to 500.

14 Q And of those four to 500 arrests, how many of them have
15 been for guns?

16 A Two hundred to 250.

17 Q Now, Officer Burbbridge, I want to direct your attention
18 to May 15th, 2008.

19 Were you working that night?

20 A Yes, I was.

21 Q What tour were you working?

22 A I was working 5:30 p.m. to 2:05 a.m.

23 Q What was your assignment that night?

24 A Borough anti-crime patrol.

25 Q What does that mean?

A1105

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CROSS - OFFICER BURBRIDGE

1 A Basically in Brooklyn North, there's 10 precincts which
2 we are assigned to which we can patrol anyone, depending on
3 where the violence is, where shootings are happening, where
4 robberies are occurring. We have a tendency to float through
5 those commands and do our anti-crime work.

6 Q What neighbors are those ten precincts in?

7 A They range from East New York, Brownsville, Bushwick,
8 Bedford-Stuyvesant, Williamsburg, Crown Heights.

9 Q Now, on May 15th, 2008, who were you working with?

10 A Officer Fox, Officer Randall.

11 Q How were you dressed that night?

12 A I was in plain clothes, although I don't recall exactly
13 what I was wearing.

14 Q Were you on foot, or were you in a car?

15 A I was in a car.

16 Q What type of car?

17 A Unmarked, black Chevrolet Impala.

18 Q Now specifically, can you tell us where you were inside
19 the car?

20 A I was seated in the front passenger seat.

21 Q Where were the other vehicles?

22 A Officer Fox was driving the vehicle next to me, Officer
23 Randall was seated behind him.

24 Q Directing your attention to approximately 12:40 a.m.,
25 where were you?

A1106

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CROSS - OFFICER BURBRIDGE

1 A We were on Broadway approaching the intersection of Park
2 Avenue.

3 Q Now, at that time, what did you observe?

4 A As we were driving on Broadway, to my right-hand side on
5 the sidewalk before Park Avenue, two individuals walking.

6 Q Can you describe those individuals?

7 A One individual male, lighter-skinned, heavy-set, pony
8 tail, approximately 6 foot. The other individual, taller, a
9 little over 6 foot, lanky, skinny, dark skinned.

10 Q Now, have you come to learn these individuals' names?

11 A Yes.

12 Q Who are they?

13 A Joshua Marshall, the individual with the pony tail,
14 Demetrios Meade, the individual -- the taller individual,
15 darker complexion.

16 Q Officer, what happened once you observed these
17 individuals?

18 A As I looked in their direction to the right of me, I
19 observed Mr. Marshall look in my direction, as they got to the
20 corner of Park and Broadway, immediately make a right-hand
21 turn as to walk away from me onto Park as we're at the
22 intersection.

23 Now, when this occurs, Mr. Meade, who the individual
24 was walking with continues straight on Broadway, a little bit
25 past where the intersection is. As this occurs, Mr. Marshall

A1107

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CROSS - OFFICER BURBRIDGE

1 looks back at Mr. Meade and motions to him, come this way,
2 come this way. Doesn't say anything, but just motions to him
3 to come this way. At that point, Mr. Meade follows him, at
4 which we make the right-hand turn in the car.

5 And just like that, we weren't far off the corner.
6 They were on my side at an angle. I could see them.
7 Mr. Meade was closer to the street on the sidewalk.
8 Mr. Marshall was a little in front of him and further away
9 from me, so deeper on the sidewalk. But it was at almost a
10 45-degree angle of my view.

11 Q Officer, I'm going to show you what's been entered into
12 evidence as Defendant's Exhibit D1 for identification. Could
13 you step off the stand, please.

14 THE COURT: Move it to the center and tilt it so all
15 the jurors can see it.

16 BY MS. CASTRO

17 Q Officer, using Defendant's Exhibit D1, can you tell us
18 where your car came to a stop?

19 A Right in this general area facing the opposite direction
20 of the cars that are parked on the side of the street.

21 Q How far down is this down the block?

22 A It's maybe 15 feet off the corner of Broadway.

23 Q Let me just show you Defendant's Exhibit F1 that's in
24 evidence.

25 Using this photo, would you be able to tell us?

A1108

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CROSS - OFFICER BURBRIDGE

1 A Yes. Our car was generally right here.

2 Q Can you circle that.

3 A Sure.

4 THE COURT: Are you using the blue?

5 MS. CASTRO: It's a black marker.

6 THE COURT: All right.

7 MS. CASTRO: Please put your initials.

8 THE COURT: And a circle.

9 BY MS. CASTRO

10 Q Now, referring to Defendant's Exhibit D1, could you tell
11 us where you observed Mr. Marshall and Mr. Meade?

12 A Mr. Marshall was approximately in this area right here
13 walking down the street there.

14 Q Indicate by a black X. And can you circle that and put
15 your initials.

16 A Sure.

17 Q Where was Mr. Meade?

18 A Mr. Meade was closer on the sidewalk, but back a little
19 further.

20 Q When you say "closer," are you referring to closer to
21 your vehicle?

22 A Closer to my side, from my point of view from the
23 vehicle.

24 Q What happened once you observed them?

25 A As I observed them, looked out the window on an angle and

A1109

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CROSS - OFFICER BURBRIDGE

1 basically said, "Police. Can I have a moment of your time,"
2 at which point Mr. Meade stopped. Mr. Marshall took another
3 step or two. I was either in the midst of getting out of the
4 car. I can't remember. I'm just trying to view it.
5 Mr. Marshall does a stutter step.

6 Q What does that mean?

7 A Like, he kind of takes -- he's walking -- after I say
8 what I say, takes a step or two. And then, kind of like this
9 (indicating) from my point of view, it looks like he was
10 trying to get himself -- or Mr. Meade in between my point of
11 view and him.

12 Q What happened next?

13 A I saw him basically reach into the front of his waistband
14 and angle towards the street but away from me. If I was
15 looking at a 45-degree angle, he threw the gun at a 45-degree
16 angle in the opposite direction, but still towards the street
17 side. Pulled it out. As that happened, as I saw him pull the
18 gun out, I pulled my gun out. I pointed it at the two
19 individuals and said, "Get up against the wall." I saw him
20 throw the gun.

21 Q Is that wall depicted in this photo?

22 A Yes.

23 Q Where did you have them step up against?

24 A Up against the wall here. As I pulled my gun out, I
25 remember Mr. Meade put his hands up right away. He was

A1110

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CROSS - OFFICER BURBRIDGE

1 standing right here. And then, I told him, "Get up against
2 the wall. Get up against the wall." They both got up against
3 the wall. At some point right after that, Officer Fox,
4 Officer Randall came up behind me. They each went to the guys
5 as I went to retrieve the gun from the ground.

6 Q You can go back on the stand.

7 Officer, during the time that you observed the
8 Plaintiff initially and then up until the time you saw him
9 throw the gun, did you ever take your eyes off of him?

10 A No, I did not.

11 Q And in total, how long did it take for you to initially
12 observe him up until the time he threw the gun? How long did
13 that take?

14 A It was less than a minute. I couldn't give the exact
15 time though.

16 Q Now, after you had the individuals up against the wall,
17 what did you do?

18 A They were cuffed. I don't recall if I cuffed them. I
19 gave the gun to Officer Randall.

20 Q Why did you give it to Officer Randall?

21 A Because he was up for the arrest. It was his turn,
22 basically.

23 Q Do you rotate who the arresting officer is?

24 A We always rotate because we're a team. And if I had an
25 arrest the night before and Officer Fox had one the night

A1111

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CROSS - OFFICER BURBRIDGE

1 before that, it was Randall's turn.

2 Q Now, can you describe the gun that you observed the
3 Plaintiff throw?

4 A Yes.

5 Q What kind of a gun?

6 A It was a revolver, a silver revolver, which is --
7 basically, there's two types of firearms, handguns. There's
8 semi-automatics or there's revolvers. Semi-automatic would be
9 more square-looking gun which takes a magazine in the bottom
10 or a clip and feeds through there, where a revolver has a
11 cylinder in the middle of the gun. And it -- in shorter
12 terms, it basically looks like an old western gun.

13 Q I'm just showing you what has been entered into evidence
14 as Defendant's Exhibit C1.

15 Is this the gun you observed?

16 A Yes, it is.

17 Q What happened after you gave Officer Randall the gun?

18 A We placed Mr. Marshall in our car and we went to the 83rd
19 Precinct for processing.

20 Q Now, Officer, you were in the courtroom when you heard
21 Plaintiff's counsel, Mr. Norinsberg, during his opening
22 statement ask whose -- when you all got there, you screamed
23 out, "Whose gun is it? Whose gun is it."

24 Did you ever say that?

25 A No.

A1112

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CROSS - OFFICER BURBRIDGE

1 Q Did you ever hear any of the other officers say that?

2 A No, I did not.

3 Q Did you ever question whose gun it was?

4 A Not at all.

5 Q Why not?

6 A Because I saw Mr. Marshall take the gun out of his waist
7 and throw it to the ground.

8 Q Now, had you had a question as to whose gun it was, say
9 you didn't observe who threw the gun, what would you have done
10 in that situation?

11 A In that situation, if you couldn't determine whose gun it
12 is -- you know you had a gun and you had two guys, say you
13 didn't know -- it was one of the two. You would handcuff both
14 individuals, take them back to the precinct, and basically
15 separate them and interrogate them as to whose gun it is until
16 one of them would give you a written confession so as you can
17 release the other guy.

18 Q Did that happen in this case?

19 A No, it did not.

20 Q Why not?

21 A Because I observed Mr. Marshall with the gun.

22 Q And what happened once you got to the precinct?

23 A Arrest processing began. That's really it.

24 Q Did there come a point in time when you spoke to the
25 district attorney's office about this case?

A1113

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CROSS - OFFICER BURBRIDGE

1 A Yes, there was.

2 Q When was that?

3 A At some point later down the line. I couldn't give you
4 an exact date.

5 Q How many times did you speak with the district attorney's
6 office about this case?

7 A Just once that I remember. Just once.

8 Q When you spoke to the assistant district attorney that
9 was handling this case, did you tell him or her the truth?

10 A Yes, yes.

11 Q Did you testify at the grand jury with respect to this
12 case?

13 A Yes, I did.

14 Q Did you testify truthfully at that proceeding?

15 A Yes, I did.

16 Q Apart from testifying at the grand jury, did you have any
17 further involvement in the prosecution of Mr. Marshall's case?

18 A No, I didn't.

19 MS. CASTRO: Thank you, Officer. I have no further
20 questions.

21 THE COURT: Thank you.

22 REDIRECT EXAMINATION

23 BY MR. NORINSBERG

24 Q Officer, you just told us that you saw Mr. Marshall make
25 a stutter step?

A1114

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REDIRECT - OFFICER BURBRIDGE

1 A Yes.

2 Q Is that your testimony?

3 A That's correct.

4 Q You never said that at any time before, did you?

5 A I don't recall if I did.

6 Q You never said that in your grand jury testimony, did
7 you?

8 A I don't recall if I did.

9 Q You never said that at your deposition, did you?

10 A I don't recall if I did.

11 Q Now, you told us earlier that you might have been in the
12 midst of getting out of the car when he threw the gun.

13 You can't remember?

14 A It's a matter of seconds, so you're not sure if you're in
15 or you're out. It's four years ago, you should remember.

16 Q So that's your testimony here; you can't remember if you
17 were getting out of the car when you saw the gun tossed?

18 A Yes, that's my testimony right here.

19 Q You testified you saw Mr. Marshall reach into the
20 waistband, correct?

21 A That's correct.

22 Q Now if he was 10 feet away from you and he was further
23 down on Park Street, his back would be towards you, correct?

24 A No.

25 Q So he turned around just enough to face the police car so

A1115

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REDIRECT - OFFICER BURBRIDGE

1 the police could see him throwing the gun?

2 A Did I show you where he threw the gun?

3 Q You can answer my question first.

4 A Sure.

5 Q Did Mr. Marshall turn around just enough so that he could
6 face the police vehicle, so the police could see him reach
7 into his waist and throw the gun?

8 A No. He's didn't face the police vehicle.

9 Q He's trying to hide the gun from you. He wouldn't have
10 turned around at all. His back would be towards you, correct?

11 A And he would've thrown it in the other direction.

12 Q He would've thrown it away, right?

13 A Yeah, in the opposite direction where I couldn't see.
14 But he didn't do that.

15 Q He wouldn't have turned around just so you could see him
16 remove a gun, would he? That doesn't make sense.

17 A If he was throwing it in the direction where he threw it,
18 then it makes perfectly good sense. Now, if he didn't want to
19 show me at all, he would throw it in the opposite direction.
20 I'm looking at him like this. He would throw it that way,
21 wouldn't he?

22 Q Are you asking questions?

23 A I'm just --

24 MS. CASTRO: Objection.

25 THE WITNESS: I'm giving you an explanation. You

A1116

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REDIRECT - OFFICER BURBRIDGE

1 want an explanation, I'm giving you an explanation.

2 BY MR. NORINSBERG

3 Q I'd like an explanation to this question.

4 A Okay.

5 Q If he's 10 feet away from you and he's further down on
6 Park Street, is it your testimony that he's going to reach
7 into his waistband and partially turn to you so you can see
8 him throw the gun?

9 A Yes.

10 Q Now, you testified a few minutes ago that you kept your
11 eyes on him the whole time, right?

12 A That's correct.

13 Q But up until that moment, all you had seen was him make a
14 hand motion, according to your testimony, right?

15 A I'm sorry, what?

16 Q Before you saw anything about a gun, all you had seen was
17 a hand motion by Mr. Marshall, right?

18 MS. CASTRO: Objection.

19 THE COURT: I'll allow it.

20 THE WITNESS: I'm sorry, say that again.

21 BY MR. NORINSBERG

22 Q Before you said anything about seeing a gun, the only
23 thing you had seen that you considered to be suspicious was
24 Mr. Marshall supposedly making a hand motion, right?

25 A It was that and another factor, too.

A1117

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REDIRECT - OFFICER BURBRIDGE

1 Q Well, the other factors came out after you made your
2 decision, right?

3 MS. CASTRO: Objection.

4 THE WITNESS: Before my decision, actually.

5 BY MR. NORINSBERG

6 Q Would you agree, Officer, that at your deposition, you
7 didn't mention any of those other factors until we had a break
8 and you spoke with your lawyer. And then, you came back and
9 mentioned the other factors, right?

10 MS. CASTRO: Objection.

11 THE COURT: I'll allow it.

12 THE WITNESS: Say that again.

13 BY MR. NORINSBERG

14 Q At your deposition, you mentioned other factors only
15 after you had met with your lawyer during a break. And then,
16 you came back and mentioned the other factors, right?

17 MS. CASTRO: Objection.

18 THE COURT: I'll allow it.

19 THE WITNESS: I don't understand where you're going
20 with this.

21 BY MR. NORINSBERG

22 Q So you can't answer that question?

23 A I'm not sure what you're referring to.

24 Q Did you change your testimony at your deposition after
25 you met with your counsel during a break?

A1118

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REDIRECT - OFFICER BURBRIDGE

1 A No, I did not.

2 MS. CASTRO: Objection.

3 BY MR. NORINSBERG

4 Q Let's see if we can break it down, Officer.

5 You remember there was a break during the
6 deposition, correct?

7 A Yes.

8 Q You recall, during that break, you had a discussion with
9 your counsel, right?

10 A Yes.

11 Q And you testified that before you had the discussion with
12 your counsel, you never mentioned any additional factors,
13 right?

14 MS. CASTRO: Objection.

15 THE COURT: I'll allow it.

16 MS. CASTRO: Your Honor, it goes to your Honor's in
17 limine ruling.

18 THE COURT: I will allow it.

19 THE WITNESS: Say that again.

20 BY MR. NORINSBERG

21 Q Before you had the discussion with your lawyer at the
22 deposition, you never mentioned any additional factors; true
23 or not true?

24 A I don't know if I did.

25 Q Well, do you recall testifying at your deposition that

A1119

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REDIRECT - OFFICER BURBRIDGE

1 the other factors just slipped your mind? Do you recall that?

2 A I don't recall that.

3 Q Referring to your deposition, Page 68, Line 5, "QUESTION:
4 Had you just forgotten about those factors, Officer?

5 "ANSWER: It slipped my mind, yeah."

6 Page 68, Line 24, "QUESTION: Now prior to having
7 that discussion with your counsel, you never mentioned any of
8 those other factors, correct?

9 "ANSWER: That's correct."

10 Do you recall giving that testimony, Officer?

11 A Yes, I do.

12 Q Officer, you testified earlier that you met with the D.A.
13 only one time?

14 A From what I remember I -- from what I remembered, one
15 time.

16 Q Well, you actually met with the district attorney first
17 on the day following the arrest, correct?

18 A No, I didn't.

19 Q Well, you met with him before you testified in the grand
20 jury, correct?

21 A No, I didn't.

22 Q You never met with the D.A. before you went to the grand
23 jury; is that your sworn testimony?

24 A Immediately, right before the grand jury, I would've met,
25 with him. Not the day after the arrest, though. The day of

A1120

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REDIRECT - OFFICER BURBRIDGE

1 the grand jury, if that's what you're trying to say, is when I
2 would have met with him.

3 Q You met with the district attorney's office on two
4 separate occasions, isn't that true?

5 A If you mean, like, the initial five minutes before I go
6 into the grand jury and the actual grand jury, then that's
7 true in a sense. But that makes no sense. It's the same
8 time.

9 Q And you also spoke with the district attorney's office by
10 telephone the night of the incident, true or not true?

11 A Not true.

12 Q You don't recall that, or you're denying you did?

13 A I didn't.

14 MR. NORINSBERG: Nothing further. Thank you, your
15 Honor.

16 THE COURT: Thank you, sir. Next witness, please.

17 MR. COHEN: At this time, we call Joshua Marshall.

18 JOSHUA MARSHALL, having first been duly sworn, was examined
19 and testified as follows:

20 THE CLERK: Please state and spell your name for the
21 reporter.

22 THE WITNESS: Josh Marshall, J-O-S-H-U-A,
23 M-A-R-S-H-A-L-L.

24 DIRECT EXAMINATION

25 BY MR. COHEN

A1121

DIRECT - J. MARSHALL

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1 Q Good afternoon, Mr. Marshall.

2 A Good afternoon.

3 Q Mr. Marshall, can you please tell the members of the jury
4 how old you are.

5 A Thirty-one years old.

6 Q Where are you currently living?

7 A Brooklyn, New York.

8 Q What section of Brooklyn, New York?

9 A Bushwick.

10 Q How long have you lived there, sir?

11 A Past few months. About six, seven months.

12 Q Mr. Marshall, I want to direct your attention to
13 May 15th, 2008.

14 Did you have an incident with the police on that
15 day?

16 A Yes.

17 Q Can you please tell the members of the jury what you were
18 doing shortly before that incident with the police?

19 A I was at the grocery store.

20 Q Which grocery store were you at?

21 A I was coming back from Broadway and Locust. There's a
22 grocery store right there.

23 Q Prior to going to the grocery store that evening, where
24 had you been?

25 A I was staying at my aunt's house on 17 Park Street.

A1122

DIRECT-J. MARSHALL

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1 Q Why were you staying at your aunt's house that evening?

2 A Well, I was living with my mother at the time. I was a
3 little sick on 452. I was a little sick. And she had a whole
4 bunch of guests over, my brother had a whole bunch of guests
5 over. So I went to my aunt's house to get a little peace and
6 quiet.

7 Q When you said 452, you just mentioned that, where was
8 your mom's house located?

9 A 452 Graham Ave.

10 Q Is that also in Brooklyn?

11 A Yes.

12 Q How far is that from your aunt's house?

13 A Not too far.

14 Q Did there come a point that evening when you left your
15 aunt's house?

16 A Yes.

17 Q At what time did you leave your aunt's house that
18 evening?

19 A A little after midnight.

20 Q What was the reason why you left that late at night from
21 your aunt's house?

22 A I was having some trouble sleeping, so I went to the
23 grocery store to get some ginger ale, some soup, Vicks, things
24 that would help me get some rest.

25 Q Can you just describe for the jury where you went shortly

A1123

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DIRECT - J. MARSHALL

1 after midnight on May 15th, 2008?

2 A No problem. I left my aunt's house, went to the corner,
3 crossed the street. There's a grocery store on Broadway and
4 Park. I went there first, picked up a few items. I believe
5 there was some soup, some soda, the ginger ale.

6 I was trying to get some Advil tablets from there,
7 but they didn't have the ones that I want, so I went across
8 down the block to Broadway and Locust to obtain that. At the
9 same time, I picked up some Vicks.

10 Q So you first went to a grocery store right on the corner
11 of Broadway and Park Street, correct?

12 A Yes.

13 Q They didn't have all the items you were looking for, so
14 you went up the street to Broadway and Locust?

15 A Yes.

16 Q How far would you say the first grocery store was from
17 the second one?

18 A A block, the most.

19 Q When you arrived at that second grocery store, did
20 something happen? Were you able to buy these products?

21 A Yeah, I was able to buy the merchandise.

22 Q What else, if anything, happened when you arrived at that
23 store?

24 A Well, I saw an associate from the neighborhood named Sip.
25 And he was going to the grocery store as well.

A1124

DIRECT - J. MARSHALL

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1 Q You ran into an individual named Sip at the grocery
2 store?

3 A Yes.

4 Q Is Sip his real name?

5 A No.

6 Q At the time, did you know Sip's real name?

7 A No.

8 Q Now, sitting here today, do you know Sip's real name?

9 A Yes.

10 Q What do you know his name to be?

11 A Demetrios.

12 Q Now, you referred to him as an associate.

13 Can you tell the members of the jury what you mean
14 by that?

15 A Somebody from the neighborhood you see, you may give a
16 small chat. Nobody that you're really close with.

17 Q Are you friends with Sip?

18 A No.

19 Q Is he just someone you say hello and goodbye to?

20 A Yeah. No problem to go and have a small chat with.

21 Q Did you have a conversation with Sip at the grocery
22 store?

23 A Yes.

24 Q And after that conversation, what did you do?

25 A Well, throughout the conversation, you know, we

A1125

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DIRECT - J. MARSHALL

1 discovered that we was both heading back down the same way. I
2 was calling it a night. He was going home for the night, so
3 we decided to walk down Broadway together.

4 Q Did you guys both walk down Broadway together?

5 A Yes.

6 Q Did there come a point when you arrived to the corner of
7 Broadway and Park Street with Sip?

8 A Yes.

9 Q What happened when you got to the corner of Broadway and
10 Park Street with Sip?

11 A We said our goodbyes. Then I made a right, and he
12 continued.

13 Q What was your intention after you said goodbye to Sip?
14 What were you intending to do after you said goodbye to him?

15 A Go make a nice bowl of soup and go to sleep for the
16 night.

17 Q Where were you intending to go at that point?

18 A My aunt's house is the first building on the block, so I
19 was going to my aunt's house then.

20 Q And what happened after you said goodbye to Sip?

21 A Made the right and started walking.

22 Q How far did you go before something else happened?

23 A At the end of the gate, -- there's a gate there -- well,
24 the corner's a store. So by the time I got to the end of the
25 gate, I realized he came -- he came my direction.

A1126

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DIRECT - J. MARSHALL

1 Q I'm going to show you what's already been put into
2 evidence by defense counsel. I'm now showing you what's been
3 marked as Defendant's Exhibit E1.

4 Do you recognize this photograph?

5 A Yes.

6 Q What do you recognize this photograph to be?

7 A Very close to the incident where I got arrested at,
8 Broadway and Park.

9 Q And can you please come up here for a second.

10 Can you please tell the members of the jury where
11 you said goodbye to Sip.

12 A Right here.

13 Q And what did you do once you said goodbye to him?

14 A I said right here, and then I made the right, right here
15 on Park Street.

16 THE COURT: Give him a marker.

17 BY MR. COHEN

18 Q Put your initials where you said goodbye to Sip.

19 THE COURT: What color marker is that?

20 MR. COHEN: I have a yellow highlighter.

21 THE COURT: Give him the yellow one, please.

22 THE WITNESS: Here.

23 BY MR. COHEN

24 Q Can you just please place your initials where you said
25 goodbye to Sip. Circle that for me.

A1127

DIRECT - J. MARSHALL

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1 And which direction were you coming from with Sip?

2 A Well, the store's right here, so we crossed the street
3 and we walked down.

4 Q And then, you made a right turn?

5 A Yes.

6 Q Did there come a point when you saw Sip again?

7 A Yes.

8 Q At what point was that?

9 A By the time I got to the gate.

10 Q I'm going to show you what's now in evidence. It's
11 Defendant's Exhibit D2.

12 Can you please tell the members of the jury or can
13 you indicate on this photograph where you were when Sip
14 rejoined you.

15 A Right here.

16 THE COURT: Marking it with yellow on a vertical
17 dark spot.

18 BY MR. COHEN

19 Q At any point prior to Sip rejoining you, did you motion
20 to him, Mr. Marshall?

21 A No, sir.

22 Q Did you in any way indicate to Sip that he should follow
23 you down Park Street?

24 A No.

25 Q Were you surprised to see him come right back beside you

A1128

DIRECT - J. MARSHALL

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1 as soon as he said goodbye?

2 A A little.

3 Q Can you explain to the members of the jury why you were
4 just a little surprised.

5 A Because we said our goodbyes, but at the same time, I
6 knew that he could walk through that block to get to where he
7 lives. But being that he said he was going to remain walking
8 down Broadway, that's what left me a little surprised.

9 Q When Sip rejoined you, did he say anything to you, sir?

10 A He informed me that the police was coming.

11 Q What did you do when he told you that information?

12 A Pretty much told him it's not my problem. I kept on
13 walking, told him it's not my problem, and kept on walking.
14 But at the same time, I looked back and did notice that the
15 police were coming, though.

16 Q So there came a time when you looked back and noticed the
17 police?

18 A Yes.

19 Q Prior to that moment, had you noticed that the police
20 were in the area at all?

21 A I didn't have the slightest care. No.

22 Q When you said goodbye to Sip on the corner of Park and
23 Broadway, had you noticed the police?

24 A No.

25 Q When you made a right on Park Street, did you start going

A1129

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DIRECT - J. MARSHALL

1 down Broadway first and then decided to make a right?

2 A What you mean?

3 Q Did you make a sudden change in direction when you were
4 walking down Broadway?

5 A No.

6 Q You always intended, when you said goodbye to Sip, to
7 make a right on Park Street; is that correct?

8 A Yes.

9 Q I'm going to show you what has been pre-marked as
10 Defendant's Exhibit G.

11 Do you recognize that document, Mr. Marshall?

12 A Yes.

13 Q What do you recognize that to be?

14 A Park Street, the place where I got locked up -- I mean,
15 arrested. And my aunt's building is the first building right
16 there.

17 Q It's a photograph, correct?

18 A Yes.

19 Q Is it a fair and accurate depiction of what the location
20 looked like on the date of the incident?

21 A Yes.

22 MR. COHEN: I ask that Defendant's Exhibit G be
23 moved into evidence as Exhibit G.

24 THE COURT: Admitted.

25 (Defendant's Exhibit G was received in evidence, as

A1130

DIRECT - J. MARSHALL

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1 of this date.)

2 BY MR. COHEN

3 Q Now, can you tell the members of the jury what you see on
4 that picture?

5 A Cars.

6 Q You mentioned that you see a building that you recognize.

7 A Yes.

8 THE COURT: Have the witness stand in front of the
9 jurors.

10 MR. COHEN: Mr. Marshall, please stand.

11 BY MR. COHEN

12 Q You mentioned a minute ago that you said your aunt's
13 building is depicted in that picture.

14 A Yes.

15 Q Can you show the members of the jury where that building
16 is.

17 A This one.

18 THE COURT: The one with the white sign --

19 THE WITNESS: Yes.

20 THE COURT: -- in the middle of the picture?

21 THE WITNESS: Yes.

22 BY MR. COHEN

23 Q Can you initial that with this yellow marker, please.

24 Thank you.

25 Mr. Marshall, that was your intention; you were

A1131

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DIRECT - J. MARSHALL

1 headed towards that building when you made a right on Park
2 Street; is that correct?

3 A Yes.

4 Q A minute ago, you said you did turn and look back and see
5 the police cars coming; is that correct?

6 A Yes.

7 Q Can you tell the members of the jury what you actually
8 saw? Were the officers in a vehicle, or on foot, or something
9 else?

10 A Oh, no. They was in a vehicle approaching a one-way
11 block.

12 Q When you say "approaching a one-way block," are you
13 referring to Park Street?

14 A Yes.

15 Q Is Park Street a one-way street?

16 A Yes.

17 Q Were they driving in the direction that -- the flow of
18 traffic of which Park Street goes?

19 A They was coming against traffic.

20 Q So they were going the wrong way on a one-way street?

21 A Yes.

22 Q And was this vehicle marked with NYPD insignias or
23 anything like that, or was it unmarked?

24 A It was an unmarked, black Impala.

25 Q Can you tell the members of the jury how you knew this

A1132

DIRECT - J. MARSHALL

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1 vehicle was a police vehicle.

2 A Just coming down a one-way block, you know, you assume
3 that that's the situation. But at the same time, I saw the
4 antennas as the car got closer.

5 Q Now, were their police lights on?

6 A No.

7 Q How about their sirens; were they on?

8 A No.

9 Q What did you do after you saw the police officers coming
10 down the street?

11 A Continued to walk.

12 Q In what direction did you continue to walk?

13 A Straight down Park Street.

14 Q Did you run at any point?

15 A No.

16 Q Did you reach into your pockets?

17 A No.

18 Q Were you holding anything?

19 A Yes.

20 Q What were you holding, Mr. Marshall?

21 A I was holding a black plastic bag with the items I bought
22 from the grocery store.

23 Q While you were walking down Park Street, was Sip walking
24 right next to you?

25 A Yes.

A1133

DIRECT - J. MARSHALL

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1 Q Where were you in relationship to Sip and the street?

2 A I was closest to the wall. We was both walking parallel.

3 Q While you were walking with Sip, could you see what he
4 was doing?

5 A Yes.

6 Q Can you tell the members of the jury what, if anything,
7 you saw Sip do while you were walking down Park Street.

8 A Well, he started reaching, grabbed what he had on his
9 waist, and threw it.

10 Q In what direction did he throw it?

11 A Ahead of us. Being that he was closer to the street,
12 there was really no other option to throw the gun. So he
13 threw it straight ahead of us.

14 Q When you say he threw it ahead of you, he threw it down
15 Park Street?

16 A Yes.

17 Q In the direction you were walking?

18 A Yes.

19 Q And at that moment, were you able to see what he threw?

20 A At first, I didn't pay too much attention to it, but as I
21 realized the situation that was occurring, I paid more detail
22 into it, and then I -- yeah. Once he got into the -- his hand
23 and started throwing into the -- I realized it was a gun.

24 Q Prior to Sip doing this, throwing this object that you
25 realized was a gun, did the officers speak you to at all?

A1134

DIRECT - J. MARSHALL

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1 A No.

2 Q Did the officers say anything to you?

3 A No.

4 Q Had the officers actually had any contact with you at
5 that point?

6 A No.

7 Q Did Officer Burbbridge say, "Excuse me, sir, may I please
8 have a moment of your time?"

9 A No.

10 Q What happened after Sip threw that gun?

11 A The officers jumped out. They had their guns drawn, told
12 us to freeze and get against the wall.

13 Q What did you do?

14 A I complied, put my hands up in the air, froze. And then,
15 the next order was get against the wall. I got against the
16 wall.

17 Q And what happened when you were up against the wall?

18 A I got searched. And then, I stood against the wall for a
19 few seconds.

20 Q Did there come a point when the officer said something to
21 you?

22 A Once they retrieved the gun, they asked whose gun it was.
23 Nobody said nothing. They asked whose gun it was. Nobody
24 said nothing. I'm looking to the left to see if Sip was going
25 to take responsibility of the situation, realized he wasn't

A1135

DIRECT - J. MARSHALL

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1 gonna take responsibility of the situation. They asked again
2 whose gun it was. I told the officers it wasn't my gun. We
3 was put in handcuffs.

4 Q When you say, "We was put in handcuffs," was it just you
5 were put in handcuffs, or were both of you put in handcuffs?

6 A We was both put in handcuffs.

7 Q You said the officers jumped out of the car.

8 How many officers were there?

9 A Three to four.

10 Q Do you see any of the officers in the courtroom today?

11 A Yes.

12 Q Do you know them by name?

13 A I'm aware of their name now, yes.

14 Q And you recognize them?

15 A Yes.

16 Q And you recognize them as the officers that arrested you?

17 A Yes.

18 Q Now, Mr. Marshall, at any point before the officers
19 arrested you, did you step behind Sip?

20 A Impossible.

21 Q Please, can you explain to the jury how that's
22 impossible.

23 A We both were walking parallel, one walking -- he's
24 walking -- he's only on the side of me. There's no way to
25 step behind him.

A1136

DIRECT - J. MARSHALL

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1 Q Did you reach into your waistband at any point before the
2 officers arrested you?

3 A No.

4 Q Did you pull anything out of your waistband before the
5 officers arrested you?

6 MS. CASTRO: Objection to all the leading questions,
7 your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: No.

10 BY MR. COHEN

11 Q We're at a point where you said you were placed in
12 handcuffs, both of you were placed in handcuffs.

13 A Right.

14 Q How long did you remain on the scene placed in handcuffs?

15 A A few minutes, give or take, three to five minutes.

16 Q Could you explain to the members of the jury what
17 happened during that three to five minutes?

18 A Well, once they put both the handcuffs on us, they spoke
19 to Sip for a few seconds. A few seconds later, they stepped
20 off, spoke amongst themselves. Next thing I noticed, he was
21 being released out of handcuffs and I was being led to the
22 vehicle.

23 Q Did you hear what they were saying when they were
24 speaking?

25 A No.

A1137

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DIRECT - J. MARSHALL

1 Q What was your reaction, Mr. Marshall, when that was
2 happening?

3 A Disbelief. I was puzzled. I couldn't believe it was
4 happening to me. I was anticipating to go home, get a bowl of
5 soup. To be led into this situation --

6 Q Mr. Marshall, what happened to those items that you had
7 with you that evening?

8 A They were thrown away.

9 Q Did the officers voucher the items?

10 A No.

11 Q Did they take them into their custody at all?

12 A Not that I'm aware of, no.

13 Q After you were taken to the vehicle, where did they take
14 you?

15 A I was taken to the 83rd Precinct.

16 Q As far as you know, was Sip taken back to the precinct?

17 A No.

18 Q What happened to you when you arrived at the precinct?

19 A Took my photos, we took my fingerprint and I just waited.
20 It was a surprise to us, being processed.

21 Q You mentioned they took your fingerprints.

22 Were you wearing gloves that evening?

23 A No.

24 Q Was Sip wearing gloves that evening?

25 A Not that I'm aware of.

A1138

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DIRECT - J. MARSHALL

1 Q How about the officers; did you see them put on gloves at
2 the scene?

3 A I'm not sure, no.

4 Q Before releasing Sip from the scene, did you see the
5 officers attempt to take his fingerprints?

6 A No.

7 MS. CASTRO: Objection.

8 THE COURT: Overruled.

9 BY MR. COHEN

10 Q Did they ask Sip, while you were at the scene, if he
11 would consent to having his DNA taken?

12 A I don't know. No.

13 Q How long did you stay at the precinct?

14 A Give or take, six to eight hours.

15 Q And then, what happened? Where were you taken after
16 that?

17 A Central booking.

18 Q How long did you remain in central booking?

19 A An additional 12 hours, maybe.

20 Q And did there come a time when you saw a judge?

21 A Yes.

22 Q How long would you say you were in police custody before
23 you saw a judge?

24 A About eight, 10 hours, 20 hours.

25 Q And can you describe to the members of the jury what

A1139

DIRECT - J. MARSHALL

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1 happened when you saw the judge.

2 A I was set for bail. They gave me a set bail.

3 Q The judge set bail?

4 A Yes.

5 Q Did there come a time that you learned what you were
6 charged with?

7 A Yes.

8 Q Was that at the time when you saw the judge?

9 A A few minutes prior to seeing the judge, I was presented
10 an attorney to update me on the situation.

11 Q What did you learn your charges were with respect to
12 this?

13 A Criminal possession of a weapon.

14 Q Were you given an opportunity to enter a plea --

15 A Yes.

16 Q -- with respect to these charges?

17 A Yes.

18 Q What was your plea?

19 A Not guilty.

20 Q Now, I'd like you to describe for the members of the jury
21 how you felt when you were in front of the judge and you
22 learned of these charges.

23 A I was lost. I didn't know if I was coming or going at
24 the moment. My lawyer told me it wasn't looking good for me.
25 The charge, itself, held a minimum of three and a half years.

A1140

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DIRECT - J. MARSHALL

1 I was lost.

2 Q What happened after you saw the judge?

3 A I was given a bail, then I was sent to Rikers Island.

4 Q You mentioned you were represented by an attorney in
5 connection with these charges.

6 A Yes.

7 Q After speaking with this attorney, were you aware of how
8 serious these charges were?

9 A Yes.

10 Q Was this case -- withdrawn.

11 Did there come a time that you learned this case was
12 being presented to a grand jury?

13 A Yes.

14 Q When did you learn that?

15 A I was given a court date the following week. And when I
16 appeared to court, my attorney informed me that if I wanted to
17 present my case to the grand jury, I had the right to.

18 Q And during that week from the time of your arrest to the
19 time when you had an opportunity to go to the grand jury,
20 where were you?

21 A On Rikers Island.

22 Q And did there come a time when you had to decide whether
23 you were going to testify in the grand jury?

24 A Yes.

25 Q Without telling the jury what was said, did you have a

A1141

DIRECT - J. MARSHALL

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1 discussion about testifying in the grand jury with your
2 attorney?

3 A Yes.

4 Q Based on this discussion, did you gain an understanding
5 of the risks of testifying before the grand jury?

6 A Yes.

7 Q What was your understanding of the risks of testifying
8 before the grand jury?

9 A That anything that I said in the grand jury could be held
10 accountable for if I was to take this case to trial.

11 Q And despite these risks, did you still choose to testify
12 in the grand jury?

13 A Yes.

14 Q Please tell the members of the jury why you decided to do
15 that.

16 A I wanted to plead my innocence. My attorney told me this
17 would be a situation where I would be able to present my case
18 to -- among peers. And it was an opportunity, and I should go
19 for it.

20 Q Now, was your attorney present when you testified in the
21 grand jury?

22 A Yes.

23 Q And was your attorney allowed to ask you any questions
24 while this case was presented to the grand jury?

25 MS. GROSS: Objection.

A1142

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DIRECT - J. MARSHALL

1 THE COURT: Overruled.

2 THE WITNESS: No.

3 BY MR. COHEN

4 Q Who was the only person questioning you in the grand
5 jury?

6 A The district attorney.

7 Q Now, Mr. Marshall, had you ever testified in a grand jury
8 before this incident?

9 A No.

10 MS. GROSS: Objection, your Honor. Objection.

11 THE COURT: Overruled.

12 BY MR. COHEN

13 Q How did that make you feel, Mr. Marshall?

14 A What, speaking in front of a grand jury?

15 Q Yeah.

16 A Well, I've never been in a position like that before, so
17 I was very nervous. Never been bombarded with questions, so I
18 didn't really know how to handle the situation. I was thrown
19 off by the whole arrest situation, me being incarcerated. So
20 it was just so much coming at me at one time. But I still
21 gave it a shot, man. You know, I was looking for a good
22 outcome.

23 Q Did you get a good outcome?

24 A No.

25 Q What happened, Mr. Marshall?

A1143

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DIRECT - J. MARSHALL

1 A I was indicted.

2 Q What happened after you were indicted? Where did you go?

3 A Right back to Rikers Island.

4 Q At that point, what was your understanding of where your
5 criminal case was going?

6 A Trial.

7 Q Why did you know the case was going to trial?

8 A Because I was not giving a guilty plea.

9 Q Can you tell the members of the jury why you weren't
10 going to plead guilty in this case.

11 A Because I was going to plead my innocence to the end.

12 Q Now, without telling the jury, again, what was said, did
13 you have discussions with your attorney about the risks of
14 taking a case like this to trial?

15 A Yes.

16 Q What was your understanding of the risks of fighting a
17 case like this?

18 A If was to take it to trial and didn't win, I was facing a
19 lot of time.

20 Q Despite these risks, did you still choose to fight these
21 charges?

22 A Yes.

23 Q Why?

24 A Once again, plead my innocence. I wasn't going to plead
25 guilty for a situation that I wasn't guilty of.

A1144

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DIRECT - J. MARSHALL

1 Q After having these discussions about this case with your
2 attorney, what was your mind-set?

3 A Before what? Please repeat that.

4 Q After having these discussions about where your case was
5 heading at that point, after the grand jury had indicted you,
6 what was your mind-set, Mr. Marshall?

7 A It's a little worse. I was a little worse because I
8 didn't have good legal representation at the time either. So
9 law library was really all that was on my mind, trying to
10 fight this case, trying to win the case, trying to fight the
11 case. I wasn't trying to do time for a case like this,
12 especially when I'm innocent.

13 Q What was your understanding about how long you would have
14 had to stay in jail while this case was pending?

15 A Until trial occurs, and trial could take up to a year or
16 two.

17 Q Did there come a time when you were actually finally
18 released from jail with respect to these charges?

19 A Yes.

20 Q When were you released from jail?

21 A The end of September. I don't know the exact date.

22 Q So approximately how long were you in jail in connection
23 with these charges?

24 A Four and a half months.

25 Q Can you just describe a little bit for the jury what the

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1 conditions were like when you were in jail.

2 A I mean, you're surrounded about everything. You know,
3 you have people with tuberculosis. You got people who just
4 don't shower. You know --

5 MS. GROSS: Objection, your Honor.

6 THE WITNESS: -- the eating situation is horrible.

7 THE COURT: I'll allow it briefly.

8 THE WITNESS: It was just depressing. It was very
9 depressing, very overwhelming. Yeah, very disturbing.

10 BY MR. COHEN

11 Q Now, after you were released from jail, were you still
12 required to come back to court with respect to these charges?

13 A Yes.

14 Q How many times did you have to come back to court?

15 A Approximately eight times.

16 Q How long was this case pending after you were released
17 from jail?

18 A About eight months.

19 Q Did there come a time when all the charges in connection
20 with your arrest on May 15th, 2008, were dismissed?

21 A Yes.

22 Q Can you tell the members of the grand jury when your case
23 was dismissed, Mr. Marshall.

24 A I believe it was May 2009.

25 Q I'm going to show you what has been pre-marked as

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1 Plaintiff's Exhibit 18.

2 Do you recognize that document, Mr. Marshall?

3 A Yes.

4 Q What do you recognize that document to be?

5 A Notification of dismissal, certificate of dismissal.

6 Q For who?

7 A For me.

8 Q With respect to this case; is that correct?

9 A Yes.

10 MR. COHEN: I ask that Plaintiff's Exhibit 18 be
11 moved into evidence.

12 THE COURT: Admitted.

13 (Plaintiff's Exhibit 18 was received in evidence, as
14 of this date.)

15 BY MR. COHEN

16 Q Mr. Marshall, I just have a few more questions. I just
17 put up what's been admitted into evidence as Defendant's
18 Exhibit C1.

19 Do you recognize this gun, Mr. Marshall?

20 A Yes.

21 Q What do you recognize it to be?

22 A The gun that was in our case, my case.

23 Q On May 15th, 2008, did you ever hold that gun?

24 A No.

25 Q On any day prior to May 15th, 2008, did you ever hold

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1 that gun?

2 A No.

3 Q Prior to May 15th, 2008, had you ever seen that gun?

4 A No.

5 MR. COHEN: I have no further questions for this
6 witness.

7 THE COURT: Thank you.

8 MS. GROSS: Judge, at this time, we'd like to ask
9 for a conference outside the presence of the jury.

10 THE COURT: Denied.

11 MS. GROSS: For the record, I'd like to note that
12 it's Defendant's position that the witness has opened the door
13 to certain testimony. And we'd like to be heard on that
14 issue.

15 THE COURT: Denied. Submit a brief, and I'll see
16 you at 9:30 tomorrow.

17 CROSS-EXAMINATION

18 BY MS. GROSS

19 Q Good afternoon, Mr. Marshall.

20 A Good afternoon.

21 Q My name is Felicia Gross. I'm counsel for Defendants,
22 Salim Randall and Michael Burbidge. I'm going to ask you a
23 few questions this afternoon.

24 You agree you were on the street after midnight that
25 morning of May 15th, 2008, right?

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1 A Yes.

2 Q You were in the vicinity of Park Street and Broadway in
3 the Bushwick section, right?

4 A Yes.

5 Q May 15th was a weeknight, right?

6 A I believe so.

7 Q You bumped into a person you called Sip, right?

8 A Yes.

9 Q Sip lived in the Bushwick houses?

10 A Yes.

11 Q His name is Demetrios Meade?

12 A Yes.

13 Q At that time, you knew Mr. Meade for a few years through
14 the Bushwick area, right?

15 A You could say yes.

16 Q You referred to him as your associate, right?

17 A Yes.

18 Q On May 15th, you and Mr. Meade were walking down Broadway
19 together, right?

20 A Yes.

21 Q You were walking down Broadway toward Park?

22 A Yes.

23 Q Then you planned to go separate ways, right?

24 A Yes.

25 Q Mr. Meade continued walking down Broadway, right?

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1 A Yes.

2 Q And you were going to make a right onto Park Street, you
3 testified?

4 A I did make a right.

5 Q You agree that that's a change in direction from
6 Broadway?

7 A Yes.

8 Q Mr. Meade was leaving you. And then after a few seconds,
9 he called your name and came back, right?

10 A Repeat.

11 Q Mr. Meade was leaving you?

12 A Yes.

13 Q And then, after a few seconds, he called your name and
14 came back?

15 A Yes.

16 Q He told you the police were coming, right?

17 A Yes.

18 Q So thanks to Mr. Meade, you were alerted that the police
19 were coming?

20 A Well, because of him, I was alerted that the police was
21 coming.

22 Q They came down the block in an unmarked car, right?

23 A Yes.

24 Q You and your associate knew it was the police?

25 A Yes.

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1 Q You saw that the police car had big antennas?

2 A Yes.

3 Q You knew it was a Chevy Impala?

4 A Yes.

5 Q By the time the police got to you, you were in reasonable
6 proximity of Mr. Meade?

7 A Repeat.

8 Q By the time the police approached you, you and Mr. Meade
9 were in reasonable proximity?

10 A What you mean by that?

11 Q You were relatively close?

12 A Yes.

13 Q You were both on the sidewalk?

14 A Yes.

15 Q And according to you, that's when your associate,
16 Mr. Meade, pulled the gun out of his coat?

17 A Yes.

18 Q Threw it into the street?

19 A Threw it ahead of us.

20 Q Threw it ahead of you.

21 You heard the sound of the gun hit the ground?

22 A Yes.

23 Q You and the officers; you all heard it?

24 A Yes.

25 MR. COHEN: Objection.

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1 THE WITNESS: I can't speak for them. I know I
2 heard it.

3 BY MS. GROSS

4 Q Do you recall giving deposition testimony in this case on
5 April 26th, 2011?

6 A Yes.

7 Q Do you recall being sworn to tell the truth at that
8 deposition testimony?

9 A Yes.

10 Q Do you recall being asked the following question and
11 giving the following answer during that deposition?

12 MR. COHEN: Page and line, please.

13 MS. GROSS: Page 111, Lines 11 through 14.

14 BY MS. GROSS

15 Q "One went to go retrieve the gun because he heard it
16 bounce on the floor.

17 "QUESTION: Who heard it?

18 "ANSWER: One of the officers. We all heard it."

19 Is that your testimony?

20 MR. COHEN: Objection. This question calls for
21 speculation.

22 THE COURT: I'll allow it.

23 Can you answer it?

24 THE WITNESS: Yes. I said yes.

25 BY MS. GROSS

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1 Q So it's your testimony that you all heard the sound of
2 the gun hit the ground?

3 A Yes.

4 Q After the gun was thrown, you agree the officers got out
5 of their car?

6 A Yes.

7 Q In fact, the officers jumped out of their car and then
8 put you and Mr. Meade against the wall, right?

9 A Yes.

10 Q You saw that the officers had their shields and guns out?

11 A Yes.

12 Q You could see that because of the car lights, right?

13 A No.

14 Q Do you recall giving grand jury testimony in this case?

15 A Yes.

16 Q Do you recall that that testimony was given under oath?

17 A Yes.

18 Q Do you recall being asked the following question and
19 giving the following answer, Page 31, Lines 7 through 11: "So
20 you could see, there was lighting above the area? Can you
21 see" -- I'm sorry, Line 10.

22 "So you could see, there was lighting above the
23 area? Can you see?

24 "ANSWER: No.

25 "QUESTION: No lighting, but you see the badge and

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1 gun?

2 "ANSWER: The car lights. Once they opened the
3 door, I saw the whole inside of the car."

4 A Okay.

5 Q Were you asked that question and did you give that
6 answer?

7 A When you asked the question just a few minutes ago, I
8 thought you meant, like, the lights of the vehicle, you know,
9 like police use in other situations.

10 Q So it's your testimony that you could see their shield
11 and guns out because of some light coming from the car?

12 A Yes.

13 Q One officer went to retrieve the gun, right?

14 A Yes, I believe so.

15 Q Found the gun on the ground?

16 A Yes.

17 Q The officer searched both of you, right?

18 A Yes.

19 Q Put you in a police car?

20 A They put me in a police car, yes.

21 Q When they searched Mr. Meade, they didn't find anything,
22 right?

23 A I don't believe so.

24 Q After a few minutes, they let him go?

25 A Yes.

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1 Q After they arrested you, they transported you to the
2 precinct?

3 A Yes.

4 Q And you were transported to the precinct in that same
5 unmarked car?

6 A I believe so, yes.

7 Q While you were being transported to the precinct, the
8 officers told you they saw you throw the gun, didn't they?

9 A Well, first I asked them to --

10 Q I'm sorry. Would you just answer the question?

11 A Right.

12 Q While you were being transported to the precinct, the
13 officers told you that they saw you throw the gun, isn't that
14 right?

15 A I can't recall.

16 Q Do you recall giving a statement to the grand jury?

17 A Yes.

18 Q Did you give the following statement: "I'm on my way to
19 the precinct" --

20 MR. COHEN: Page, please, and line?

21 MS. GROSS: Page 18, lines 22 to 25, and page 19,
22 line one.

23 BY MS. GROSS:

24 Q "I'm on my way to the precinct, to go to the precinct. I
25 realize that they got me as the individual to be the one with

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1 the gun, saying that they saw me throw the gun."

2 Did you give that statement to the grand jury?

3 A Yes.

4 Q Was that a correct statement?

5 A Yes.

6 Q So while you were being transported to the precinct, the
7 officers told you that they saw you throw the gun?

8 A Yes.

9 Q Isn't that true?

10 You were taken to the 83 Precinct, right?

11 A Yes.

12 Q Federal officers came to the precinct, right?

13 MR. COHEN: Objection.

14 THE COURT: I'll allow it.

15 BY MS. GROSS:

16 Q Those federal officers asked you questions, right?

17 A Yes.

18 Q Those federal officers asked you about the gun?

19 A Yes.

20 Q That wasn't a conversation you wanted to have, was it?

21 A No.

22 Q So you never once told the federal officers it wasn't
23 your gun, did you?

24 MR. COHEN: Objection.

25 THE COURT: I will allow it.

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1 A There was a reason behind that.

2 THE COURT: All right. He didn't have to say
3 anything. He wasn't under the obligation to say anything. He
4 had a Constitutional right to be silent. His silence should
5 not be held against him.

6 BY MS. GROSS:

7 Q You had an opportunity to talk to the federal officers,
8 right?

9 A Yes.

10 Q You never once told the federal officers that it wasn't
11 your gun, did you?

12 MR. COHEN: Objection.

13 THE COURT: That's been repeated. I've already
14 instructed the jury. Sustained.

15 BY MS. GROSS:

16 Q You were arraigned in criminal court for criminal
17 possession of a weapon, right?

18 A Yes.

19 Q Judge set the bail at \$25,000?

20 A Yes.

21 Q Judge had the options of releasing you on your own
22 recognizance, didn't he?

23 A I don't know.

24 Q Judge had the option of setting a lower bail, right?

25 MR. COHEN: Objection.

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1 THE COURT: Sustained.

2 BY MS. GROSS:

3 Q You couldn't make bail, so you were held in custody,
4 right?

5 MR. COHEN: Objection.

6 THE COURT: Sustained.

7 BY MS. GROSS:

8 Q You're not claiming you suffered any emotional or
9 psychological injury from this incident, are you?

10 MR. COHEN: Objection.

11 THE COURT: You're objecting?

12 MR. COHEN: Yes.

13 THE COURT: Sustained.

14 BY MS. GROSS:

15 Q You testified before the grand jury on May 19th, 2008,
16 right?

17 A (Nods head affirmatively.) Yes.

18 Q And you told the grand jury your version of what happened
19 that night, right?

20 A Yes.

21 Q That your associate, Mr. Meade, threw the gun, not you?

22 A Yes.

23 Q Grand jury indicted you on three counts of criminal
24 possession of a weapon, right?

25 A Yes.

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1 Q That means you would stand trial for criminal possession
2 of a weapon?

3 A Yes.

4 Q You made bail on September 26, 2008, and were released
5 from custody?

6 A Yes.

7 Q You didn't have to pay the lawyer who represented you at
8 the criminal proceeding, right?

9 MR. COHEN: Objection.

10 THE COURT: Are you claiming the fee?

11 MR. COHEN: No.

12 THE COURT: All right.

13 Don't answer.

14 MS. GROSS: No further questions, Your Honor.

15 THE COURT: Now, ladies and gentlemen, the fact that
16 a grand jury indicted him is not evidence of any guilt. Is
17 that clear?

18 (All jurors answer affirmatively.)

19 THE COURT: So it's not what the grand jury
20 believed. It's what you believe. You understand that?

21 (All jurors answer affirmatively.)

22 BY MR. COHEN:

23 Q Mr. Marshall, Ms. Gross just asked you, if you changed
24 directions when you got to Park Street. You weren't changing
25 directions. You had always intended to go to your aunt's

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1 house on Park Street, isn't that correct?

2 A Yes.

3 Q That was the direction you intended to go?

4 A Yes.

5 Q Now, with respect to the officers making that statement,
6 to you in the vehicle, that they saw you throw the gun.

7 Wasn't that statement made to you in response to you asking
8 why you were arrested -- why they were arresting you?

9 A Yes.

10 MS. GROSS: Objection; leading.

11 MR. COHEN: I have no further questions, Your Honor.

12 THE COURT: All right. Step down. You may step
13 down.

14 You have another witness?

15 MR. NORINSBERG: That's the last witness for today,
16 Your Honor.

17 THE COURT: No, it isn't. Where's your witness?

18 MR. NORINSBERG: Okay. Well, I believe that's our
19 case-in-chief, and I believe that --

20 THE COURT: Are you resting?

21 MR. NORINSBERG: Yeah.

22 THE COURT: All right.

23 MR. NORINSBERG: Can I confer one second with
24 counsel, just to make sure we have all the documents?

25 THE COURT: You may. Take a short recess.

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1 MR. NORINSBERG: Okay.

2 THE COURT: Take a short recess, ladies and
3 gentlemen, please.

4 MR. NORINSBERG: (Nods head affirmatively.)

5 THE COURT: All right.

6 MR. NORINSBERG: Thank you.

7 THE COURT: Five minutes, please.

8 (Recess.)

9 (Jury exits.)

10 MR. NORINSBERG: We're prepared to rest on the
11 record.

12 THE COURT: Plaintiffs rest?

13 MR. NORINSBERG: Should we do it in the front of the
14 jury, Your Honor or no?

15 THE COURT: No.

16 MS. CASTRO: Your Honor, at this point, the
17 defendants would like to make a motion pursuant to Rule 50 of
18 the Federal Rules of Civil Procedure.

19 With respect to the false arrest claim bought forth
20 by the plaintiff, it's our position that they have not met the
21 standard to prove their claim.

22 Specifically, they failed to show that there was a
23 lack of probable cause. In fact, the officer's testimony this
24 morning has established that there was probable cause for the
25 arrest. There was testimony that they observed the plaintiff

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1 remove the handgun from his waistband and throw it out into
2 the street. This was observed by Office Burbridge, who gave
3 such testimony. And further, Officer Randall corroborates
4 that testimony. Plaintiff has not established that that is
5 not what the officers observed.

6 With respect to the malicious prosecution claim,
7 defendants submit that, again, there was probable cause for
8 the prosecution. While Officer Randall was the officer who
9 provided the District Attorney's office with the information
10 to commence the proceedings against the plaintiff and
11 plaintiff was, in fact, indicted by this grand jury, that
12 indictment creates presumption of probable cause. Plaintiff
13 has not refuted that presumption.

14 For that reason, Your Honor, we ask that you dismiss
15 the claims.

16 THE COURT: Motion is denied. It's strictly a
17 question of credibility.

18 MS. CASTRO: Your Honor, we also add that the
19 officers are entitled to qualified immunity. If the jury were
20 to believe the plaintiff's claim that it was Mr. Meade and not
21 him that threw the gun and they were mistaken in their
22 observation then, again, they would be entitled to qualified
23 immunity. It was simply a mistake.

24 THE COURT: Denied, under the circumstances of this
25 case; However, you may brief it and I'll have you brief an

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1 argument at 930.

2 MS. CASTRO: Thank you, Your Honor.

3 THE COURT: The case presented would support a
4 verdict that the defendants deliberately lied.

5 Bring in the jury, please.

6 Get your next witness ready, please.

7 (Jury enters.)

8 THE COURT: Now, sit down, please. The plaintiff
9 has rested. The defendant is now putting on a case.

10 Swear the witness, please.

11 (Witness sworn.)

12 THE CLERK: Please state and spell your name for the
13 reporter.

14 THE WITNESS: Kieran Fox, K-I-E-R-A-N, F-O-X.

15 BY MS. CASTRO:

16 Q Good afternoon.

17 A Hi. Good afternoon.

18 Q Can you please introduce yourself to the jury?

19 A My name is Kieran Fox. I'm a New York City Police
20 officer.

21 Q How long have you been employed by the New York City
22 Police Department?

23 A Twelve years.

24 Q What is your current rank?

25 A I'm a police officer.

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1 Q Where are you assigned?

2 A I'm assigned at Brooklyn North Anticrime Unit?

3 Q And how long have you been assigned there?

4 A Seven years.

5 Q Can you tell us what your duties and responsibilities are
6 as a police officer in the Anticrime Unit?

7 A We are responsible for in-progress violent street crimes,
8 like robberies, burglaries, shootings, things of that nature.

9 Q And specifically, where you are assigned, do you cover
10 certain neighborhoods?

11 A Yes.

12 Q What neighborhoods to you patrol?

13 A We are responsible for Brownsville, East New York, Crown
14 Heights, Bed-Stuy, Greenpoint, Bushwick, Williamsburg, Fort
15 Greene, Brooklyn Heights and part of Carroll Gardens.

16 Q Now, Officer, how many arrests have you made in the
17 course of your career?

18 A I presently have 156 arrests.

19 Q How many arrests have you been involved with?

20 A A little over a thousand.

21 Q And of those thousand arrests, approximately how many
22 have been for guns?

23 A About 200.

24 Q Officer Fox, I want to direct your attention to May 15th,
25 2008. Were you working that night?

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1 A Yes, I was.

2 Q What tour were you working?

3 A It's called the fourth platoon. It's 5:30 at night to
4 2:05 in the morning.

5 Q And what was your assignment that day?

6 A Anticrime.

7 Q Were working with anyone?

8 A Yes.

9 Q Who were you working?

10 A I was working with Police Officer Michael Burbridge and
11 Police Officer Salim Randall.

12 Q How were you dressed that day?

13 A In plain clothes.

14 Q What about the other two officers?

15 A Plain clothes, as well.

16 Q Did you have anything that would identify you as a New
17 York City Police Officer?

18 A I had my shield around my neck.

19 Q Did the other officers have shields, as well?

20 A Yes.

21 Q Now, on that night, were you on foot or in a car?

22 A I was in an unmarked police car.

23 Q What type of car was it?

24 A I believe it was a Chevy Impala.

25 Q Where were you positioned in the car?

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1 A I was the driver.

2 Q Where were the other officers?

3 A Officer Burbridge was sitting in the passenger seat and
4 Officer Randall was sitting behind me.

5 Q Let me direct your attention to 12:40 a. m. on that
6 night. Where were you?

7 A I was on Park Avenue, approaching the intersection with
8 Broadway.

9 Q What happened at that time?

10 A At that time, as we approached the corner, I could see
11 two gentlemen walking on the opposite side of Broadway.

12 Q Would you identify what those men looked like?

13 A One was a tall male, black. The other was a tall
14 Hispanic gentleman with a ponytail.

15 Q Did you come to learn these individuals' names?

16 A Yes.

17 Q Who were they?

18 A The male, black's name was Demetrius Meade, and the other
19 gentleman was Joshua Marshall.

20 Q Officer, I want to show you what's been marked as
21 Defendant's Exhibit E for identification. Can you tell us
22 what is depicted in this document (indicating)?

23 A (Examines photograph.) This is the corner of Broadway
24 and Park Street. This is the opposite side of Broadway from
25 Park Avenue, where I -- the R & P, the police car was stopped

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1 at the corner.

2 MS. CASTRO: Your Honor, I ask that Defendants'
3 Exhibit E be moved into evidence.

4 THE COURT: E, as in --

5 MS. CASTRO: Elephant.

6 THE COURT: As in "easy"?

7 MS. CASTRO: Yes.

8 THE COURT: Marked in evidence.

9 MS. CASTRO: As well as Defendants' Exhibit E-1,
10 which is a blowup of that same document.

11 THE COURT: Marked it as in evidence.

12 BY MS. CASTRO:

13 Q Officer, could you tell me what the lighting conditions
14 were at that hour on that street corner?

15 A It pretty well lit at that corner. If you'd look at the
16 picture, there's a street light right at the corner. It's got
17 a one-way sign on it.

18 And what a lot of people don't know -- always
19 realize, when you're under the elevated train like that, the
20 street lights are actually lowered to be underneath the train.
21 If you look in the picture, you can see two additional street
22 lights on the same side of Park and then there's another one
23 on the opposite side of the street.

24 Q Officer, would you step forth in front of the photo and
25 point out these street?

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1 A (Complies.)

2 Q Officer, could you circle the street lights that you see
3 in this photograph, Defendants Exhibit E-1?

4 A There is a street light currently right here, which is --
5 this is the Park Street sign, the one I was speaking of, and
6 you notice here is the elevated train. You have a lowered
7 street light here. There's another one here. There's one
8 pretty far down. There's another one on the other side of the
9 street right here. Plus, you have this street light. The
10 street lights here.

11 And in this is a pretty well-lit area, where the
12 bodega signs and stuff at night kind of stay open. The liquor
13 store light is on pretty much to like three or four in the
14 morning. On top, that's a pretty good description.

15 Q Let me show you what's been entered into evidence as
16 Defendant's Exhibit D-1. Do you recognize what's depicted in
17 this photograph? (Indicating.)

18 A (Examines photograph.) This is the opposite side, pretty
19 much where the other picture was taken from. This is Park
20 Street. (Indicating.) This is, of course, all the way right
21 about here. This picture will take you from where you're
22 standing right there, but this is the corner of -- Broadway is
23 here this is Park Street. (Indicating.)

24 Q Were there any street lights on Park Street?

25 A There is a street light right here in the middle, on the

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1 corner and the same down the block.

2 Q You have identified where the street lights were. Were
3 they turned on that night?

4 A Yes, they were.

5 MS. CASTRO: You can go back to your seat.

6 THE WITNESS: (Complies.)

7 BY MS. CASTRO:

8 Q Officer, after you observed the individuals, what did
9 you do next?

10 A As I observed the individuals, I noticed that they were
11 looking at the car. They were on Broadway still. Quickened
12 their pace a bit and made a quick to -- right-hand turn onto
13 Park Street, started heading towards the next block up, which
14 is Beaver.

15 Q What did you do?

16 A At that time, I started to turn off of Park Avenue where
17 I was, and started to make the turn onto Broadway, and as I
18 noticed, I looked back across at them and they started to
19 separate.

20 Q When you went down that street, is that a one-way street?

21 A Yes, it is.

22 Q How far down did you go?

23 A Just off the corner.

24 Q Was there any other traffic in the area at that time?

25 A No.

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1 Q Were there any other individuals walking down the street
2 besides Mr. Meade and Mr. Marshall?

3 A No.

4 Q What happened next?

5 A At that time, as I pulled up to the -- made the turn,
6 Officer Burbridge was looking out the passenger window and at
7 that time, he said, "Police department. How are you tonight?"

8 Q Was there a response?

9 A At that time, Mr. Meade stopped where he was and he
10 quickly turned. He look over his shoulder. Mr. Marshall was
11 walking him behind him. Mr. Meade turned. His head pulled
12 back around. He lifted his hands up like this
13 (demonstrating), and just after he did that, I heard a metal
14 clang hit the ground.

15 THE COURT: Who held up his hands?

16 THE WITNESS: Mr. Demetrius Meade.

17 THE COURT: All right. Describe how he lifted his
18 hand.

19 BY MS. CASTRO:

20 Q You're indicating that he had his palms up?

21 A Yes. He lifted his hands up and his palms. He was
22 looking at the palms of his hands and he was looking directly
23 at the car.

24 Q Just using the photograph that is Defendant's Exhibit
25 D-1, can you just identify where you observed the individuals?

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1 A (Complies.)

2 Q Specifically, where you said that Mr. Meade stopped.

3 A (Complies.)

4 THE COURT: What color -- you're using what color?

5 Wait just a moment, please. We have that color on already.

6 I'll give you another color.

7 MS. CASTRO: Thank you.

8 THE COURT: Here's a green pencil. (Handing.)

9 BY MS. CASTRO:

10 Q Sir, using this green pencil, can you identify where you
11 observed Mr. Meade stop and put his hand up?

12 A Right around here. (Indicating.)

13 THE COURT: Put your initials next to that, please,
14 and have an X.

15 THE WITNESS: (Complies.)

16 BY MS. CASTRO:

17 Q Where did you observe Mr. Marshall?

18 A Mr. Marshall was walking back here. (Indicating.)

19 THE COURT: Put an M in green, please.

20 THE WITNESS: Excuse me, sir?

21 THE COURT: M in green, please.

22 THE WITNESS: Yes, sir.

23 BY MS. CASTRO:

24 Q And put your initials next to that.

25 A (Complies.)

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CROSS - J. MARSHALL

1 Q Where was the car?

2 A The car was parked over in this area here. (Indicating.)

3 THE COURT: Put a C there for car, please.

4 THE WITNESS: (Complies.)

5 BY MS. CASTRO:

6 Q Approximately how far away would you estimate the car was
7 from the sidewalk?

8 A Maybe eight, nine feet.

9 Q The length of a car?

10 A The length of a car, plus, you know, if I stopped -- if I
11 stopped, the car was making enough room, if the door had
12 opened or somebody had to get out, he wouldn't be pinned in
13 against the car.

14 Q So what happened after Mr. Meade put his hands up?

15 A I heard -- he was like this (demonstrating), and then I
16 heard a large bang, like a metal bang hit the grounds.

17 Q What happened next?

18 A At that time --

19 MS. CASTRO: You can sit down.

20 THE WITNESS: (Complies.)

21 A I, at that time, we exited the vehicle, went through the
22 cars, the parked cars there. Mr. Marshall had turned and
23 started to walk back to Broadway. Officer Randall, I saw him
24 out of the corner of my eye go towards Mr. Marshall.

25 I approached Mr. Meade. He started to back up. And

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CROSS - J. MARSHALL

1 I said, "Police Department. Don't move. Don't move." And I
2 put my hand on him. He back up. So at that point, I just
3 pushed him to the ground and handcuffed him.

4 I did see the gun laying on the ground off to my
5 left. And from there, I picked Mr. Marshall (sic) up. I
6 looked over my shoulder. Officer Randall had had Mr. Marshall
7 against that roll-down gate you could see in the picture, and
8 he was handcuffing him there, as well.

9 Q What type of firearm did you see?

10 A It was a silver -- metal silver .38 caliber. It was a
11 revolver.

12 Q And happened after you put Mr. Meade in handcuffs?

13 A I explained to him, you know, "I saw you pick up your
14 hands. I know you didn't have that gun. I know it was the
15 other guy's gun and just calm down and then I'm going to let
16 you go. I'm going to take your information and you'll be on
17 your way."

18 Q Before you got out of the car and eventually when you did
19 get out the car to approach Mr. Meade, did you ever take your
20 eyes off of him?

21 A No.

22 Q And how long in total would you say that this entire
23 incident occurred?

24 A Less than a minute.

25 Q At any point when you got out of the car and heard the

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CROSS - J. MARSHALL

1 sound of the metal, did anybody ever ask, whose gun is it?

2 A No.

3 Q Did you ever ask whose gun it is?

4 A No, I didn't have to.

5 Q Why not?

6 A I knew it was Mr. Marshall's, because Mr. Meade never
7 moved.

8 Q Following the handcuffing of Mr. Marshall, what happened
9 next?

10 A Officer Burbridge recovered the firearm. I explained to
11 Mr. Meade, I took his information, I got any information. I
12 filled out a form. And I, you know, it's called a UF-250
13 form. I filled that out, sent him only his way. Mr. Marshall
14 was put in the back of the unmarked car, and him and the
15 firearm were taken to the 83 Precinct.

16 Q Where is the 83 Precinct located?

17 A It's in Bushwick. It's at the corner of Knickerbocker
18 and Bleacher Street. It's 480 Knickerbocker Avenue is the
19 address.

20 Q Once at the precinct, what occurred?

21 A At that time, arrest processing, fingerprinting, firearm
22 was vouchered and it gets sent to the ballistics lab for
23 testing.

24 Q Now, at any point in time, did you ever speak to the
25 District Attorney's Office about this case?

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CROSS - J. MARSHALL

1 A No.

2 Q Did you ever testify at the grand jury?

3 A No, I did not.

4 MS. CASTRO: Thank you. I have nothing further.

5 THE WITNESS: Thank you.

6 BY MR. NORINSBERG:

7 Q Good afternoon, Officer Fox.

8 A Hello. How are you, sir?

9 Q This incident took place in May of 2008, is that correct?

10 A I thought it was March. What's the date?

11 Q May 2008, approximately four years ago, correct?

12 A That's correct.

13 Q Now, this is the first time, four years later that you
14 are giving any testimony about what you actually saw that
15 night, right?

16 A That's correct, sir.

17 Q You didn't testify at the grand jury, correct?

18 A That's correct.

19 Q You didn't give any testimony in this civil deposition,
20 right?

21 A That's correct.

22 Q This is the first time you're telling what you actually
23 saw that night, right?

24 A That's correct.

25 Q Did you meet with defense counsel before coming here?

A1175

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CROSS - OFFICER FOX

1 A Yes.

2 Q When was the first time you met with them?

3 A About a week ago.

4 Q So the first time you met with anybody, any defense
5 lawyer for the defendants in the case was almost four years
6 after this incident, right?

7 MS. CASTRO: Objection.

8 THE COURT: Overruled.

9 BY MR. NORINSBERG:

10 Q Is that correct?

11 A That's correct.

12 Q So just last week ago, you were called down and they
13 wanted to find out what you knew, right?

14 A Yes, sir.

15 Q And you went over what you were going to testify to today
16 in front of the jury, right?

17 A Yes, sir.

18 Q Now, you testified earlier that when you first saw these
19 two men, they were looking at your car, right?

20 A When I first saw them, they were walking on Broadway
21 and --

22 Q Then you testified --

23 THE COURT: Excuse me.

24 MS. CASTRO: Objection.

25 THE COURT: He hasn't finished his answer.

A1176

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CROSS - OFFICER FOX

1 MR. NORINSBERG: I'm sorry.

2 A I said they were walking on Broadway, and then they
3 looked at the car.

4 BY MR. NORINSBERG:

5 Q Okay. So when you said "they," you were referring to
6 Mr. Marshall and Mr. Meade, right?

7 A That's right.

8 Q And then you said they quickened their pace, correct?

9 A Yes.

10 Q That would include Mr. Meade, right?

11 A Yes.

12 Q And when you got to that scene, you handcuffed both of
13 them, didn't you?

14 A Yes, sir.

15 Q And the reason why you handcuffed both of them is because
16 you never saw who threw that gun, true?

17 A Well, I didn't see who threw the gun, but I knew
18 Mr. Meade didn't throw the gun.

19 Q So you were driving down the wrong way on a one-way
20 street, correct?

21 A That's correct.

22 Q It was dark at night, correct?

23 A No, not -- that corner is very well lit.

24 Q There's a 24-hour laundromat right at that street, isn't
25 there?

A1177

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CROSS - OFFICER FOX

1 A Yes, there is.

2 Q So you didn't know if there was any people -- if there
3 was going to be any people or any cars there, right?

4 A That's correct.

5 Q You had to careful when you proceeded down that street,
6 right?

7 A I just turned off the corner from Broadway.

8 Q When you were going down the street, you had to be
9 careful to make sure there were pedestrians and no cars,
10 correct?

11 A That's correct.

12 Q As the driver of that police vehicle, that was your
13 number one priority, right?

14 A That's correct.

15 Q You couldn't look over at what's happening on the
16 sidewalk and also drive at the same time down that street,
17 could you?

18 A Like I said, I turned directly off the corner and
19 stopped. So once I got to that corner, I looked down the
20 block and saw nobody coming or nobody walking, I made that
21 turn.

22 Q Sir, it's a busy commercial area, isn't it?

23 A No, it's not.

24 Q Aren't there a lot of stores right on that street?

25 A It's 12:40 in the morning.

A1178

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CROSS - OFFICER FOX

1 Q There's a twenty-four hour laundromat right at the
2 corner, isn't there?

3 A Before I worked in the Brooklyn North --

4 Q My question is -- I'm sorry.

5 MR. GOTTLIEB: Objection, Your Honor. The witness
6 --

7 MR. NORINSBERG: It's nonresponsive.

8 THE COURT: Yes, I'll allow it.

9 You can answer.

10 A I worked in the 83 Precinct, which is where that area is
11 right there. That area in question, if you don't live down
12 that block, you're really not driving down it. Most of the
13 traffic that goes to that 24-hour laundromat is foot traffic,
14 and it's on the other side of the street.

15 BY MR. NORINSBERG:

16 Q Do you know that Mr. Marshall was actually staying on
17 that street, at 17 Park Treat. Do you know that?

18 A No, sir.

19 Q Do you know this his aunt lives at that address that he's
20 actually at, that house? He was going back to her apartment
21 that night?

22 MS. CASTRO: Objection.

23 THE COURT: I'll allow it.

24 A No, I did not.

25

A1179

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CROSS - OFFICER FOX

1 BY MR. NORINSBERG:

2 Q Now, you said that when -- at some point, you saw
3 Mr. Meade throw up his arms, is that right?

4 A He put his hands up. He didn't throw them up. He just
5 lifted them up.

6 Q So Mr. Meade, basically, did he turn around to do that?

7 A He faced the car.

8 Q He turned around to show you, look, it's not me, right?
9 I've got nothing in my hands, right?

10 A He didn't do -- make any movement like that. He just
11 stopped and picked his hands up very quickly like this
12 (demonstrating).

13 Q That was after they already threw the gun, true?

14 A No.

15 Q He was trying to show you.

16 THE COURT: Excuse me. Excuse me.

17 Finish your answer.

18 A He lifted his hands, looked at the car, and then the
19 metal object hit the ground.

20 BY MR. NORINSBERG:

21 Q And you remember all that four years later, right,
22 Officer?

23 A Yes, I do.

24 Q And how many hundreds of arrests have you made in your
25 career?

A1180

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CROSS - OFFICER FOX

1 A Over a thousand.

2 Q Over a thousand arrests in your career and you just
3 happen to remember four years later all that detail, right?

4 A That's correct.

5 Q Did meeting with the attorneys for these two defendants
6 help refresh your memory a little bit about what happened?

7 MS. CASTRO: Objection.

8 THE COURT: I'll allow it.

9 A No.

10 BY MR. NORINSBERG:

11 Q Well, you do agree that you spoke to Officer Burbridge
12 one week before he gave his deposition testimony in this
13 trial -- in this civil action? Isn't that true?

14 MS. CASTRO: Objection.

15 THE COURT: I'll allow it.

16 A No, I don't understand the question.

17 BY MR. NORINSBERG:

18 Q You had a conversation about this lawsuit with Officer
19 Burbridge just one week before he testified at his deposition
20 in this case, true?

21 A I don't remember that.

22 Q And if Mr. Officer Burbridge acknowledged in his
23 deposition that he spoke to you one week before that
24 deposition about this very lawsuit, would that surprise you?

25 MS. CASTRO: Objection.

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1 THE COURT: I'll allow it.

2 A No, it wouldn't be.

3 BY MR. NORINSBERG:

4 Q Now, no one actually had to subpoena you to be here,
5 right?

6 A Excuse me?

7 Q You're not here pursuant to a subpoena, right?

8 A No, sir.

9 MS. CASTRO: Objection.

10 BY MR. NORINSBERG:

11 Q You came voluntarily to help out your former partner,
12 isn't that true?

13 MS. CASTRO: Objection.

14 THE COURT: I'll allow you to explain why you're
15 here.

16 A I was notified by the New York City Police Department to
17 come here you.

18 BY MR. NORINSBERG:

19 Q And you came here voluntarily, right?

20 A Yeah. I basically can't say no. This is part of my job,
21 to testify in a courtroom.

22 Q You understood that the allegations in the case were that
23 your former partner had made false statements to the District
24 Attorney's Office. You understood that, right?

25 MS. CASTRO: Objection.

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CROSS - OFFICER FOX

1 THE COURT: I'll allow it.

2 A Yes.

3 BY MR. NORINSBERG:

4 Q You understood that your role here was to help him out in
5 the case, true?

6 MS. CASTRO: Objection.

7 THE COURT: I'll allow it.

8 A Yes.

9 MR. NORINSBERG: Thank you. Nothing further.

10 BY MS. CASTRO:

11 Q Officer Fox, how fast were you going when you were
12 driving down that street?

13 A I was crawling.

14 Q Did you hit anything?

15 A No.

16 Q Was anyone walking across the street when you were
17 turning?

18 A No.

19 Q And turning to the interaction with Mr. Marshall, did he
20 ever at any point tell you that it wasn't his gun?

21 A No.

22 Q And did he volunteer information that he was going to his
23 aunt's house?

24 THE COURT: I couldn't hear the question.

25

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REDIRECT - OFFICER FOX

1 BY MS. CASTRO:

2 Q Did he voluntary that he was going to his aunt's house?

3 THE COURT: Excuse me. I instruct you again that
4 anybody stopped that way has a Constitutional right to remain
5 silent, and silence may not be used against him. Do you
6 understand that?

7 JURORS: (All answered affirmatively.)

8 BY MS. CASTRO:

9 Q Officer Fox, did you see Mr. Meade throw that gun?

10 A No, he didn't. He never moved.

11 Q Was anyone else on that street?

12 A No.

13 Q Who else was there besides Mr. Meade?

14 A Mr. Marshall.

15 Q Did you see Officer Burbbridge throw a gun?

16 A No.

17 Q Did you see Officer Randall throw a gun?

18 A No.

19 Q Did you throw a gun?

20 A No.

21 MS. CASTRO: Thank you. Nothing further.

22 MR. NORINSBERG: Two more questions?

23 THE COURT: All right. Stay where you are. One
24 question.

25 MR. NORINSBERG: Okay.

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RECROSS - OFFICER FOX

1 BY MR. NORINSBERG:

2 Q You didn't see Mr. Meade throw the gun, but you also
3 didn't see Mr. Marshall throw the gun, true or not true?

4 A That's correct.

5 MR. NORINSBERG: Thank you.

6 THE COURT: Thanks very much. That will be all.

7 THE WITNESS: Thank you.

8 THE COURT: Next witness, please.

9 MS. CASTRO: Your Honor, we have two more witnesses
10 that we have scheduled for tomorrow. So at this point, we
11 don't have any others. Those are our last two.

12 THE COURT: All right. I'll have to let you go
13 earlier. I'm sorry. Be here tomorrow promptly at ten. Don't
14 discuss the case. Don't do any research much. Just come in
15 fresh. Good night.

16 (Jury exits.)

17 THE COURT: I'll see counsel at 9:30 tomorrow.
18 Final briefing on anything you want. I want those two
19 witnesses here on time. They should take very little time.
20 And your summations will begin tomorrow.

21 How long will the plaintiff take?

22 MR. NORINSBERG: Your Honor, I'm going estimate
23 around 45 minutes, and I ask for a little latitude, if
24 possible.

25 THE COURT: Yes, you can have it.

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RECROSS - OFFICER FOX

1 MR. NORINSBERG: And I would like to have the
2 rebuttal, at least to have a very brief rebuttal.

3 THE COURT: What?

4 MR. NORINSBERG: My understanding of the general
5 rule in the Eastern District is I would go first --

6 THE COURT: Oh, you mean on the summations?

7 MR. NORINSBERG: Yes.

8 THE COURT: Yes. Forty-five minutes.

9 Defendants, how long?

10 MS. CASTRO: We estimate about the same amount of
11 time, half-hour to 45 minutes.

12 THE COURT: And then you want ten minutes for
13 rebuttal/

14 MR. NORINSBERG: Yes, please, Your Honor.

15 THE COURT: Okay. Yes. Nothing else? See you in
16 the morning. Thank you.

17 (Trial continued to April 25, 2012, at 9:30 a. m.)
18
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25

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TRIAL TRANSCRIPT, DATED APRIL 25, 2012
(pp. A1187-A1244)

REPRODUCED FOLLOWING

A1188

1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3 JOSHUA MARSHALL,
4 Plaintiff,
5 versus 10-CV-02714 (JBW)
6 THE CITY OF NEW YORK,
7 Defendant. United States Courthouse
8 Brooklyn, New York
9
10 April 25, 2012
11 9:30 A.M.
12 ***VOLUME II**
13 CONTINUED TRANSCRIPT OF TRIAL
14 Before: HON. JACK B. WEINSTEIN,
15 UNITED STATES DISTRICT JUDGE
16
17 APPEARANCES:
18 FOR THE PLAINTIFF:
19
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21 Attorneys for the Plaintiff
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23 233 Broadway - Suite 1800
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37 JOHANA CASTRO, ESQ.
38 FRANCES SANDS, ESQ.

JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter

2

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8 produced by Computer-aided Transcription.
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JUDI JOHNSON, RPR, CRR, CLR - Official Court Reporter

3

1 (In open court.)
2 COURTROOM DEPUTY: All rise. The United States
3 District Court for the Eastern District of New York is now in
4 session. The Honorable JACK B. WEINSTEIN is now presiding.
5 (Honorable JACK B. WEINSTEIN takes the bench.)
6 COURTROOM DEPUTY: Calling civil trial proceedings
7 in Docket no. 10-CV-2714, Joshua Marshall against The City of
8 New York.
9 THE COURT: Marshall v. Randall and Burbridge.
10 I have the defendants' brief in support of multiple
11 trial motions.
12 MR. COHEN: Your Honor, may I step outside just to
13 get my co-counsel?
14 THE COURT: If he's here.
15 MR. COHEN: He's here.
16 MS. CASTRO: Your Honor, I will step out and get my
17 co-counsel as well.
18 (A brief pause.)
19 THE COURT: I've gone over this brief in support of
20 the defendants' multiple trial motions. Thank you very much
21 for getting this in early. It was helpful to be able to read
22 it early this morning.
23 I'll briefly summarize the conclusions I have and
24 changes I'm making, and then if it's necessary, we can have
25 further argument.

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4

1 Defendants asked to be permitted to cross-examine
2 the plaintiff as to his criminal history now that he has
3 opened the door to such testimony. I don't think he's opened
4 the door. That is denied.
5 Second, plaintiff has improperly made an issue of
6 the legal validity of the officers' initial approach in
7 contravention of the Court's prior order. Defendants request
8 a curative instruction and, in the alternative, a mistrial.
9 As I explained yesterday, there was no contravention of the
10 Court's prior order. The testimony was properly limited to
11 the period from which the defendants had first observed the
12 plaintiff to the time of arrest.
13 Defendants asked for a mistrial, which is denied on
14 the merits.
15 Third, defendants should be permitted to
16 cross-examine plaintiff as to his emotional and psychological
17 injuries. He's not seeking damages. And I'll modify the
18 charge, as I'll explain in a moment, to make that clear.
19 Fourth, defendants should be permitted to mention in
20 closing that the criminal case was dismissed on Speedy Trial
21 rules. I've already dealt with that, and I see no reason to
22 reopen that. It's been discussed repeatedly.
23 Defendants request a curative instruction as to the
24 import of the grand jury's indictment. That's five, and it's
25 combined really with six. Instruction of a presumption of

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PROCEEDINGS	5	PROCEEDINGS	6
1 probable cause. I'll deal with that in a moment in my		1 confusing? Why don't you just put their names in, okay?	
2 proposed change to the instructions.		2 MS. GROSS: Yes.	
3 And defendants move to dismiss the malicious		3 MS. SANDS: Yes.	
4 prosecution and fair trial claims in the light of the United		4 THE COURT: So it's against PO Salim Randall -- we	
5 States Supreme Court's recent decision in Rehberg,		5 don't need the shield number -- and Michael Burbridge, that's	
6 R-E-H-B-E-R-G. I dealt with that, and the answer is no. I'm	6	6 all. We'll take out the PO. Salim Randall and Michael	
7 not going to reconsider that.		7 Burbridge.	
8 Now, as I understand it, the plaintiff is not going		8 Now, if you turn to Page 8, just before the final	
9 to try to impugn the legal validity of the initial approach in		9 paragraph, I propose to put in this paragraph, which I believe	
10 closing; is that correct?		10 is required by Second Circuit cases, although I believe those	
11 MR. NORINSBERG: That's correct. The only		11 Second Circuit cases are misguided and that this is confusing,	
12 references will be made to that with respect to credibility,		12 but I'll put it in.	
13 that he said one thing and then it's another. We're not		13 "A grand jury's indictment creates a presumption	
14 challenging the stop in closing.		14 that probable cause for prosecution existed. You may find the	
15 THE COURT: All right. That's sufficient. I think	15	15 presumption rebutted, that is overcome, and that no probable	
16 the transcript indicates that that is appropriate.		16 cause for prosecution existed, based on all the evidence."	
17 There was no request for a limiting instruction as		17 We can discuss that after I finish giving you all	
18 to time. I think that a limiting instruction at this time		18 the changes.	
19 would be more confusing than helpful.		19 On Page 9, just above D, proximate cause, at the end	
20 So much for the brief. Now, if you'll turn to the		20 of the page, the last sentence should read: "If a defendant	
21 proposed jury charge. The first change I propose to make is	21	21 presented accurate evidence to the prosecutor or presented	
22 on Page 8.		22 false evidence, thinking it was true, then you must find for	
23 And before I get to that, do you want to put in that	23	23 the defendant."	
24 you're suing -- this is the first page -- these officers in		24 Page 10, three paragraphs up from the bottom,	
25 their individual and official capacity? I think that's just	25	25 beginning "plaintiff claims," add: "He is not seeking a	
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PROCEEDINGS	7	PROCEEDINGS	8
1 recovery for any emotional or psychological injuries. He is		1 right to pull alongside plaintiff and ask where are you going,	
2 not seeking loss of earnings."		2 what are you doing is not at issue in this case.	
3 Then on page 14, it says "if you answer all of the		3 Plaintiffs have repeatedly during the course of	
4 above questions in the negative." Cross out "in the negative"	4	4 their direct and cross-examinations of the officers asked	
5 and say is "no." And then in place of "in the affirmative,"		5 questions impugning the validity of the initial approach,	
6 put "yes."		6 including whether the officers saw furtive movements, what the	
7 And then under compensatory damages, leave that as	7	7 officers saw that led them to initially approach the	
8 it is. That's 4A and 4B.		8 plaintiff. That, from defendants' perspective, so infects the	
9 And under 5A, add: "Punitive damages from Officer	9	9 testimony in this case that it requires a curative instruction	
10 Randall, what amount of punitive damages is awarded." And	10	10 or, in the alternative, a mistrial. They have focused on it	
11 then the same change on 5B, just for clarification.		11 extensively in their testimony. I think the jury now	
12 Now, what is the further request of the defendants		12 reasonably believes that there is some issue as to the	
13 and objections?		13 validity, the legal basis upon which the officers relied in	
14 MS. GROSS: Your Honor, if I might be heard briefly.	14	14 initially approaching.	
15 The defendants would like the record to note our		15 THE COURT: Where would it go? I can say that the	
16 objection to Your Honor's rulings with respect to the points	16	16 stop was -- is not challenged.	
17 1, 2, 4, 5 and 6 of the brief.		17 MS. GROSS: That's what we'd be asking for.	
18 And with respect to point 2 of the brief,		18 Might I just have a moment?	
19 defendants' position is that plaintiffs improperly opened the	19	19 THE COURT: Where do you want that? The validity of	
20 door and have improperly referenced the initial approach. And	20	20 the stop is not challenged. Where do you want that?	
21 Your Honor correctly identifies that they have focused on the	21	21 MS. GROSS: Page 7, very beginning. I believe the	
22 time from which defendants first observed plaintiff until the	22	22 paragraph starts with "the issue for you."	
23 time of the arrest. That includes the time of the initial		23 THE COURT: Which paragraph?	
24 approach. Your Honor's pretrial ruling was that the initial	24	24 MS. GROSS: Sorry. The first paragraph on Page 7 of	
25 approach was not at issue. That defendants had the legal	25	25 the April 24 draft I believe reads "the issue for you." It's	
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1 the first paragraph. We would suggest that right before that

2 paragraph, the instruction Your Honor has just proposed be

3 given.

4 MR. NORINSBERG: We would -- if we could be heard on

5 that, Your Honor.

6 THE COURT: Yes. I'm just putting it in.

7 Is there anything else you want?

8 MS. SANDS: Just one more thing, Your Honor.

9 THE COURT: Yes.

10 MS. SANDS: On that same page, Page 7, the second

11 full paragraph -- I'm sorry, the third full paragraph, where

12 it says "the existence of probable cause is measured at the

13 moment of arrest."

14 THE COURT: Yes.

15 MS. SANDS: I would ask that there be an explanation

16 as to -- I know there's explanations throughout the charge,

17 but right there, at the end of that sentence, that something

18 to the effect that probable cause exists when an examination

19 of all the facts and circumstances known to the police officer

20 that it is reasonable for the officer to believe that a crime

21 has been or is being committed. Because I think when we say

22 the existence of probable cause is measured at the moment of

23 arrest, right there, there isn't any explanation of what

24 probable cause is.

25 THE COURT: I think I'll deny that. I've

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1 sufficiently explicated that point.

2 What is the plaintiff's view of what changes I've

3 proposed or not proposed?

4 MR. NORINSBERG: I just wanted to address the one

5 change relating to the additional language on the stop, and

6 then counsel will handle the rest of them, if we could.

7 THE COURT: Yes.

8 MR. NORINSBERG: I mean, we do object, Your Honor,

9 to even having any instruction on the lawfulness of the stop.

10 What we were doing through cross-examination was using it

11 strictly for impeachment and credibility.

12 THE COURT: Yes.

13 MR. NORINSBERG: And if the Court is inclined to add

14 the charge that defendants have requested, we would also

15 request in that same sentence that the court say that

16 "However, to the extent there has been testimony relating to

17 the stop, you may consider such testimony as it relates to the

18 credibility of the defendants."

19 MS. GROSS: We would object to that language, the

20 addition of that language, Your Honor.

21 THE COURT: It's going to read as follows: "The

22 initial stop was lawful. Evidence relating to observations

23 and acts surrounding the stop may be considered in deciding

24 credibility."

25 What else do you want?

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1 MR. COHEN: Your Honor, I want to direct your

2 attention to Page 8. With respect to the paragraph, actually,

3 plaintiff suggested yesterday just to make sure that we have

4 no issues with Rehberg. My understanding of the language that

5 was going to be put in was "may be liable for what he said to

6 prosecutors."

7 THE COURT: What are you referring to?

8 MR. COHEN: The second paragraph on Page 8 under

9 malicious prosecution. The second clause.

10 THE COURT: Yes.

11 MR. COHEN: Yesterday, when we discussed this, Your

12 Honor suggested that, you know, the first sentence and then

13 the second sentence was going to end where it says

14 "prosecutor." "He may be held liable for what he said to the

15 prosecutor."

16 This additional clause was not discussed yesterday,

17 if his statement was not in preparation for his grand jury

18 testimony. That's not what Rehberg says. It's just said

19 what's said in the grand jury is not subject to 1983. In

20 fact, it says the opposite in a footnote. Anything said to

21 the prosecutor is presented to the grand jury --

22 THE COURT: Let's see the footnote.

23 MR. COHEN: I have it right here.

24 MS. GROSS: Which footnote?

25 MR. COHEN: There's only one footnote in the whole

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1 case.

2 As you can see, Your Honor, this footnote clearly

3 states statements made to the prosecution, of course, are

4 still -- if they're made falsely, they are obviously still

5 actionable under 1983.

6 MS. GROSS: With due respect, Your Honor, defendants

7 don't believe that's what the footnote says, that that's what

8 it stands for.

9 THE COURT: Rehberg is certainly ambiguous on point.

10 MR. COHEN: The other thing, Your Honor, just the

11 way that the --

12 THE COURT: Excuse me. Let me just continue to read

13 this.

14 I think you made a text that supports what I've

15 written. "A grand jury witness" -- I'm quoting from the

16 opinion slip sheet, I guess it is, Page 12. "A grand jury

17 witness has absolute immunity for any Section 1983 claim based

18 on the witness's testimony. In addition, as the Court of

19 Appeals held, this rule may not be circumvented by claiming

20 that a grand jury witness conspired to present false testimony

21 or by using evidence of the witness's testimony to support any

22 other 1983 claim concerning the initiation or maintenance of a

23 prosecution. Were it otherwise called, a criminal defendant

24 turned civil plaintiff could simply reframe a claim to attack

25 the preparation instead of the absolutely immune actions

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1 themselves." Citing Buckley, B-U-C-K-L-E-Y, and Deykes,
2 D-E-Y-K-E-S.

3 "In the vast majority of cases involving a claim
4 against a grand jury witness, the witness and the prosecutor
5 conducting the investigation engage in preparatory activity,
6 such as a preliminary discussion in which the witness relates
7 the substance of his intended testimony. We decline to
8 endorse a rule of absolute immunity that is so easily
9 frustrated."

10 And then it drops Footnote 1. And Footnote 1
11 suggests some limits to activity of the witness outside of the
12 grand jury room and shows a reluctance to grant absolute
13 immunity.

14 I think under the circumstances, that the charge as
15 I have it is accurate.

16 What else?

17 MR. COHEN: Your Honor, with respect to the addition
18 you just added at the bottom of Page 8, that a grand jury
19 indictment creates the presumption that probable cause
20 exists --

21 THE COURT: Yes.

22 MR. COHEN: -- the plaintiff agrees with Your Honor,
23 and especially in light of this decision. This whole
24 presumption no longer matters because what he said in the
25 grand jury is immune. So they can't have it both ways. They

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1 can't have it that the presumption is created and then now
2 plaintiffs not be able to challenge what actually was said in
3 the grand jury. This no longer is even applicable. All it's
4 going to do, as Your Honor stated correctly, is confuse the
5 jury, especially if what plaintiff is saying is correct,
6 the --

7 THE COURT: You're absolutely right, that as a
8 result of the decisions of the Second Circuit and the New York
9 court of Appeals and the Supreme Court of the United States,
10 I've given and I feel I'm compelled to give the jury an
11 instruction that a first-year student of criminal procedure
12 would have difficulty in following. But I can't simplify it
13 in light of the precedence. Here's Rothstein v. Carriere, 373
14 F.3d 275, Second Circuit, 2004, Page 282. "The District Court
15 disregarded the rule that a grand jury's indictment creates a
16 presumption that the criminal proceeding was supported by
probable cause."

18 MR. COHEN: So if I can ask the Court to just amend
19 the language proposed. At the very least, if Your Honor has
20 to put this language in, that the probable cause that's
21 presumed by the grand jury indictment, it can rebut it not as
22 Your Honor said, by all the evidence presented in this case,
23 but rather by the false testimony, if you believe false
24 testimony was given by the defendants in this action.

25 THE COURT: No, I don't think I'm going to do that.

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1 You can argue that that's important evidence. But I think I'm
2 going to have to do this.

3 What else?

4 MR. COHEN: Your Honor, again, with respect to
5 Page 9, Your Honor added language with respect to the mind set
6 of the defendants, thinking that it is true. The second
7 paragraph on Page 9. Saying that the officers either saw the
8 gun or thought they saw the gun. Again, we've been over this
9 with the facts in this case. There's never been wavering by
10 either of the defendants thinking that they saw something they
11 didn't see. They've had the opportunity many times to testify
12 that they may have been mistaken, but they painstakingly have
13 chosen to go the path that they were not mistaken. So giving
14 them this out, this, oh, well, we were mistaken, is -- just
15 goes against the facts of this case.

16 THE COURT: I don't think so. People often think
17 they've seen something and are very positive about it without
18 lying. I won't go into the full psychology of it, but I think
19 it's appropriate. You can argue it.

20 Anything else?

21 MR. COHEN: Yes. Finally, with the compensatory
22 damages, Your Honor. Your Honor has added this line about
23 plaintiff is not seeking emotional and psychological injury.
24 When I objected to defendants' cross-examination of my client
25 with respect to -- the way she phrased the question was

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1 psychological or emotional injury. He did not seek any
2 psychological treatment. That's my objection. He is seeking
3 emotional injuries with respect to having to face the charges
4 that he didn't commit, just the general emotional injury that
5 comes with being accused of a crime that he did not commit.
6 But specifically did he seek medical treatment? No.

7 THE COURT: All right. You can argue that to the
8 jury. This is the way I'm going to charge because that's what
9 the evidence shows.

10 Anything else?

11 And the claim is clear.

12 MR. NORINSBERG: I just would like to raise some
13 issues with respect to the summation very briefly.

14 THE COURT: Yes.

15 MR. NORINSBERG: The Court yesterday repeatedly had
16 to admonish defense counsel that my client had no obligation
17 to make statements to law enforcement officers. I would just
18 ask the Court to make a ruling now that they cannot make that
19 argument during their summation.

20 THE COURT: They don't plan to.

21 Do you?

22 MS. CASTRO: No, Your Honor.

23 MR. NORINSBERG: The second thing is, just in my
24 experience in having cases with the city, I plan during the
25 punitive damages section of my closing argument to use the

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1 language that the verdict should send a message, and that		1 have your verdict.	
2 language, I know from past experience the city repeatedly		2 THE COURT: What?	
3 objects to. But I feel it's entirely appropriate in the		3 MS. SANDS: Shouldn't there be a sentence there that	
4 context of punitive damages, and I don't want to be		4 you then you have a verdict? There should be some instruction	
5 interrupted when I'm making that. So I just wanted to ask the		5 that directs the jury at the time they reach the verdict to	
6 Court to make that ruling.		6 sign off.	
7 THE COURT: They have a right to interrupt. I don't		7 THE COURT: No, I don't think I need that.	
8 think it's helpful. I think the charge is right. I'm not		8 All right. Then I'm going to have this typed up for	
9 going to change or instruct.		9 distribution to the jury when I read my charge.	
10 Anything else?		10 MR. COHEN: Your Honor, there's one more thing.	
11 MR. NORINSBERG: Well, I'm not talking about the		11 THE COURT: Yes.	
12 charge. I'm just talking about me being able to argue that		12 MR. COHEN: Not with respect to the charge. Your	
13 point to the jury.		13 Honor -- we requested a Daubert hearing in this case.	
14 MR. COHEN: I'll permit you to argue. If they		14 THE COURT: Yes.	
15 object, I'll overrule it.		15 MR. COHEN: And I've done some research on the	
16 MS. CASTRO: Your Honor, we will note our objection		16 matter. And Daubert requires that when making the opinion,	
17 now and during plaintiff's closing to any attempts of sending		17 the expert in the case has to rely on scientific evidence,	
18 a message to anyone.		18 empirical or testing or some theory or technique that has an	
19 THE COURT: Well, that's what deterrence is, isn't it?		19 error rate or has some sort of scientific control. The	
20 it?		20 opinion expressed in this report is: "In my experience at the	
21 MS. CASTRO: We would note our objection to it.		21 Chief Medical Examiner's office, analysts often yield	
22 MS. SANDS: Your Honor, one more thing as to the		22 insufficient amounts of DNA when swabbing firearms."	
23 verdict sheet. After -- on Page 14, when the second question		23 It's an opinion without any basis. I would like to	
24 is "If you answer all of the questions no, do not continue the		24 explore with this expert what she's basing that opinion on.	
25 following question," shouldn't there be a sentence that you		25 In fact, I found more information on the Chief Medical	
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1 Examiner's website which contradicts what this says.		1 THE COURT: He's entitled to speak to the witness.	
2 THE COURT: You can do that on cross-examination and		2 overruled.	
3 then move to strike. I'm not going to waste my time with a		3 MS. CASTRO: May we be present for that meeting?	
4 Daubert hearing. I want to close the case. The long		4 THE COURT: Pardon me?	
5 experience of a scientific observer is entitled to great		5 MR. COHEN: May we be present for the meeting?	
6 weight.		6 THE COURT: I don't think it's necessary.	
7 MR. COHEN: Your Honor, may I at least speak to the		7 MS. SANDS: Your Honor, we would be present at a	
8 witness before she takes the stand? Can I have a few minutes		8 deposition if that's what would have happened.	
9 to speak to her?		9 THE COURT: You can tell your witness if he doesn't	
10 THE COURT: Where is the witness?		10 want to talk to him, he doesn't have to. He's entitled to a	
11 MS. CASTRO: She's outside.		11 private discussion.	
12 THE COURT: Take five minutes.		12 (Recess.)	
13 MR. COHEN: Can I have 10 minutes?		13 THE COURT: Be seated.	
14 THE COURT: Ten minutes.		14 Good morning, everyone.	
15 MR. COHEN: I'm sorry, Your Honor. I just want to		15 THE JURY: Good morning, Your Honor.	
16 make -- I haven't deposed this witness.		16 THE COURT: Some of you have trouble hearing me. Do	
17 THE COURT: I don't want to impede you in your		17 you hear me now?	
18 duties in any way.		18 THE JURY: (Affirmative nod.)	
19 Then you'll have your witness ready to testify		19 THE COURT: Call your witness, please.	
20 immediately.		20 MS. GROSS: Defendants call Police Officer Joseph	
21 MS. CASTRO: We will, Your Honor. But we also		21 date Sena.	
22 our object to plaintiff's request to speak with the witness.		22 THE COURT: Swear the witness.	
23 THE COURT: You object to what?		23 JOSEPH SENA, having first been duly sworn, was examined and	
24 MS. CASTRO: Plaintiff's request to speak to the		24 testified as follows:	
25 witness?		25 THE CLERK: Please be seated and state and spell	
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1 your name for the court reporter.

2 THE WITNESS: Name is Police Officer Joseph Sena.

3 J-O-S-E-P-H, last name Sena, S-E-N-A.

4 DIRECT EXAMINATION

5 BY MS. GROSS:

6 Q Good morning, Officer Sena.

7 A Good morning.

8 Q Could you please tell your current title to the jury?

9 A I am currently a police officer with the New York City

10 Police Department.

11 Q Which unit are you assigned to?

12 A I'm assigned to the Brooklyn North evidence collection

13 team.

14 Q Where is the evidence collection team based?

15 A 84th Precinct, downtown Brooklyn.

16 Q What are your responsibilities with the evidence

17 collection team?

18 A We respond to scenes, such as burglaries, criminal

19 possession of weapons, non-fatal shootings, robberies; and

20 when we get to the scenes, we collect evidence, such as DNA,

21 fingerprints. We take photographs.

22 Q Approximately how many cases do you handle per year?

23 A Per year, I would say somewhere around 240, 250 cases.

24 Q Approximately how many times have you performed

25 fingerprint analysis?

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1 A Just about every job I go on.

2 Q Can you give the Court an approximation?

3 A 240, 250.

4 Q That's per year?

5 A Per year.

6 Q Approximately how many times during the course of your

7 seven years would you say you have performed these analyses?

8 A I would say roughly around 1,500 times.

9 Q And with respect to DNA collection?

10 A DNA collection, probably half of that many times.

11 Q What sort of training have you had in fingerprint testing

12 and DNA collection?

13 A Well, we had a four-day course conducted at the crime

14 scene lab, conducted by crime scene detectives, and just, you

15 know, everyday training, on-the-job training.

16 Q What did you do prior to your employment with the

17 evidence collection team?

18 A I was a patrolman in the 84th Precinct.

19 Q For how long?

20 A Thirteen years doing that.

21 Q I'd like to turn your attention to your involvement with

22 the gun recovered on May 15th, 2008 in this case. How did you

23 come to be involved?

24 A We received a call to process a firearm.

25 Q Where did you go to get the gun?

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1 A The firearm was at the 77 annex, which is a satellite for

2 the 77 precinct.

3 Q Why the 77 annex? Why did you go there?

4 A It was my understanding that that's where the anti-crime

5 team is based out of, that building.

6 Q For what purpose did you go?

7 A We went to process the firearm.

8 Q Who gave you the firearm?

9 A Police Officer Randall.

10 Q Was Officer Randall known to you personally?

11 A No.

12 Q What type of gun was it?

13 A It was a .38 Smith & Wesson revolver.

14 Q Officer Sena, did there come a time when you took a

15 photograph or photographs of the gun?

16 A Yes, I did.

17 MS. GROSS: Your Honor, may I approach the witness?

18 THE COURT: Yes.

19 MS. GROSS: Your Honor, I'm showing the witness

20 Defendant's Exhibit C1.

21 BY MS. GROSS:

22 Q Officer Sena, is this an enlarged picture of the

23 photograph you took?

24 A Yes, it is.

25 Q Officer Sena, please explain to the jury what they're

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1 looking at.

2 A That is the firearm that I processed at the scene with

3 the cartridges right above it.

4 Q How many cartridges or bullets were recovered?

5 A Six.

6 Q What type of handle does the gun have?

7 A A black rubber handle.

8 Q Approximately how long is the gun?

9 A I would say somewhere around 9 to 10 inches.

10 Q Officer Sena, do you note that the photograph you took

11 has a date stamp?

12 A Yes, it does.

13 Q That's the wrong date, isn't it?

14 A Yes, it is.

15 Q How did it come to have the wrong date?

16 A The date on the camera, I do not know how to work that

17 function, and that's the way the camera was at that time.

18 Q Did you take the photo that was the basis of this

19 enlargement?

20 A Yes.

21 Q Did you take more than one photo?

22 A Yes, I did.

23 Q Okay. Where were the photos kept?

24 A The photos are kept at my base with my paperwork.

25 Q And that's where they've been for the last four years?

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1 A Yes.

2 Q Once you arrived at the 77 annex to collect the gun, how
3 did you collect it from Officer Randall?

4 A I used latex gloves.

5 Q Let's turn to the test. Please explain to the jury the
6 fingerprint testing you did on the gun.7 A Well, the fingerprint testing I did was a fuming process,
8 and that process is like maybe like a 2-foot-high tent-like
9 structure that we use; and on top of that, inside the
10 structure, is a clasp that we use to attach the item, in this
11 case, the firearm. And on the bottom we heat up some super
12 glue and the super glue fumes, and the fumes rise to the top,
13 where the item is being held, and it adheres to the item,
14 hopefully in the -- to show fingerprints on the item.15 Q What were the results in the fume test that you
16 performed?

17 A Negative results.

18 Q What does that mean?

19 A There was no fingerprints to make a positive
20 identification.21 Q In your experience, it is -- is it unusual for the tests
22 to yield either no prints or not enough print material to
23 test?

24 MR. COHEN: Objection.

25 THE COURT: I'll allow it. Based on your

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1 experience.

2 A Based on my experience, firearms do not produce
3 fingerprints. They are unlikely to.

4 Q Why is that?

5 A Just the texture of the gun is grainy, bumpy. It's not
6 conducive to fingerprints.7 Q How would you describe the texture of the 38 Smith &
8 Wesson revolver in this case?9 A Well, the handle has bump grains to it and, you know,
10 will not hold -- in my experience, is not conducive to holding
11 fingerprints.12 Q How many firearms have you fume tested during your
13 experience with the evidence collection team?14 A Between fuming and dusting, I do approximately two every
15 month, and, you know, times that every year, 24 -- 24 times
16 six. I'd say hundreds. You know, about a hundred and change,
17 at least.

18 Q How many positive results have you had?

19 A Zero, none.

20 Q So you've never recovered fingerprints from a gun?

21 A Never recovered a fingerprint from a firearm.

22 Q You testified earlier that there were six cartridges or
23 bullets found.

24 A Yes.

25 Q Did you test those cartridges?

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1 A No.

2 Q Why not?

3 A This is a case of criminal possession of a weapon, and
4 we're trying to find out who possessed the weapon and not
5 loaded the weapon. So it's not our practice to test the
6 cartridges.7 Q In your experience, are cartridges amenable to testing,
8 given their surface and size?9 A They're small in size, so the positive result of getting
10 a fingerprint off of that would probably be not conducive as
11 well.12 Q Please explain to the jury the DNA evidence that you
13 collected from the gun.14 A The DNA evidence I collected is just kind of swabs that
15 we use, and we go over the frequently touched areas of the gun
16 to extract some skin cell DNA.

17 Q Which areas of this gun were tested?

18 A Three areas. The trigger, trigger guard is one. The
19 handle, the back strap grips. And it's a revolver; it has a
20 hammer and cylinder release, so those areas.21 Q What was done with the cotton swab test samples that you
22 collected?23 A After I swabbed the gun, I packaged them and send out
24 packages to the police lab to be analyzed.

25 Q If you know, what were the results of the DNA analysis

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1 this case?

2 A I learned that it was an insignificant amount of DNA to
3 make a positive identification.4 Q Was that the end of your involvement with the testing of
5 the gun?

6 A Yes, that was it.

7 Q Finally, Officer Sena, have you ever worked with or
8 encountered the officers involved in this arrest, Officer
9 Randall, Officer Burbridge or Officer Fox?

10 A No.

11 MS. GROSS: Thank you, I have no further questions.

12 CROSS-EXAMINATION

13 BY MR. COHEN

14 Q Good morning, Officer Sena.

15 A Good morning.

16 Q How are you?

17 A Good.

18 Q You didn't testify in the grand jury in this matter,
19 correct?

20 A I believe I did not.

21 Q And you didn't testify at the deposition in this civil
22 action, correct?

23 A I believe I did not, no.

24 Q When were you made aware of when -- that the civil action
25 even existed?

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1 A Last week maybe.

2 Q So, quite frankly, you were not even aware for the last

3 four years that Mr. Marshall has been suing Officer Randal

4 and Officer Burbridge until last week; is that correct?

5 A That's correct.

6 (Continued on the next page.)

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2 Q And in the last four years from when you did this test,

3 you haven't thought about this case, have you?

4 A No.

5 Q You had no reason to, correct?

6 A That's correct.

7 Q And moments ago I saw you outside in the hallway, you

8 were refreshing your memory, right, looking at your notes?

9 A Yes.

10 Q Because you don't have any specific independent

11 recollection of what you did on May 15, 2008, correct?

12 A Specific recollection? I mean, I remember fuming the

13 gun, I do remember swabbing the gun.

14 Q But you've done hundreds of these, right?

15 THE COURT: Excuse me. Do not interrupt the

16 witness, please. You can finish your answer, sir.

17 THE WITNESS: Okay. Thank you.

18 A I remember fuming and swabbing it for DNA, yes.

19 Q Do you remember this specific gun that you fumed?

20 A This specific gun, I remember fuming it, yes.

21 Q Now, Officer Sena, you just testified that you are a part

22 of a unit called the evidence collection team in the NYPD,

23 correct?

24 A Yes.

25 Q And your unit is called that because you are usually

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1 called to scenes to collect evidence, right?

2 A Yes.

3 Q And you just testified actually on direct that that's

4 what you generally do, you are called to scenes, I believe you

5 said to violent crime scenes robberies and burglaries and

6 criminal possessions of weapon scenes, correct?

7 A That's correct.

8 Q And, in fact, you just also mentioned on direct that you

9 get this special training on how to collect the evidence at

10 the scene, correct?

11 MS. GROSS: Objection, your Honor. Objection.

12 don't believe that was the testimony.

13 THE COURT: You may inquire.

14 Q Was that the case, you get the training on how to collect

15 evidence?

16 A Yes.

17 Q So as not to contaminate the evidence?

18 A Yes.

19 Q You want to make sure -- and when you take something, you

20 mentioned a minute ago you put on gloves when Officer Randal

21 gave you the gun, right?

22 A Yes.

23 Q You don't want to put your own fingerprints on the gun?

24 A That's right.

25 Q And you don't want to put your own DNA on the gun?

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CROSS - OFFICER SENA 32

1 A Right.

2 Q And you did training to make sure that that doesn't

3 happen?

4 A Yes.

5 Q And when you were a patrol officer for 13 years you

6 didn't get that training, right?

7 A No.

8 Q You got that because you're part of this specialized

9 team, correct?

10 A Right.

11 Q And this is done so that the NYPD can use science as a

12 way to make -- to find out what actually happened at a crime

13 scene, correct?

14 A Yes.

15 Q The whole point is that often in crime scenes there's a

16 dispute; one side is saying I threw a gun, like in this case,

17 and one side is saying, I didn't throw a gun -- or I didn't

18 see somebody throw a gun, correct?

19 THE COURT: Don't answer.

20 Q You are familiar with the facts of this case, right,

21 Officer Sena?

22 A Yes.

23 Q And you're aware that Plaintiff Joshua Marshall is suing

24 Officer Burbridge and Randall because he is claiming they

25 didn't see who threw this gun, right?

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CROSS - OFFICER SENA 33

1 THE COURT: Don't answer.

2 Q In this particular case though you weren't actually

3 called to the scene, right?

4 A No.

5 Q You weren't actually called until approximately five

6 hours and 15 minutes after this arrest happened; is that

7 correct?

8 A I don't know the approximate time. I know when I

9 responded to the 77 annex to process the firearm.

10 Q And -- well, is there anything that could refresh your

11 recollection as to --

12 A Well, my tour starts at 7 in the morning and I got to the

13 77 annex approximately around 8:30, so an hour and a half

14 after my tour started, so...

15 Q But would there --

16 A So anything before that, I don't know.

17 Q Are you the only person on the evidence collection team?

18 A No.

19 Q There are other members of the evidence collection team?

20 A Yes.

21 Q And are there members of the evidence collection team

22 that work at night?

23 A No. There is no midnight tour of the evidence collection

24 team.

25 Q There is no midnight tour?

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1 A No, there is not.

2 Q So when crimes happen at night --

3 A There's an answering machine. And if there is a crime

4 that happens, usually they'll call up and there will be a

5 message on the answering machine.

6 Q But there are special protocols with respect to the NYPD

7 on what they're supposed to do when there is evidence to be

8 collected at the scene, correct?

9 A Yeah.

10 Q They are supposed to safeguard that evidence to make sure

11 that no one -- let me just finish the question, sir. Sorry.

12 Safeguard the evidence to make sure no one

13 contaminates the evidence, waiting for the evidence collection

14 team to come and collect the evidence?

15 A Well, if it's possible they have it safeguarded at the

16 scene, yes, if it's feasible do that.

17 Q So you tested this at the 77 precinct annex, correct?

18 A That's right.

19 Q But when you normally get called to the scene, do you

20 often test the gun at the scene?

21 A Yes.

22 Q You didn't do that in this case as well, correct?

23 A No, I did not.

24 Q And you arrived at the 77 annex at approximately

25 8:30 a.m.?

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CROSS - OFFICER SENA 35

1 A Yes.

2 Q And you prepared a report with respect to this, your

3 involvement in this matter, correct?

4 A Yes.

5 Q And you prepared that in the regular course of your

6 business; is that right?

7 A Yes.

8 Q I'm going to show the witness what's been marked as

9 Plaintiff's Exhibit 3. Do you recognize that document, sir?

10 A Yes.

11 Q What do you recognize it to be?

12 A This is the evidence collection team report that we fill

13 out at each job that we respond to.

14 Q And is this the evidence collection report you filled out

15 with respect to this case?

16 A My partner filled this out, yes.

17 Q Is your signature at the bottom of it?

18 A Yes, my signature is at the bottom.

19 Q So you adopted the information that is included in that

20 document?

21 A Yes.

22 MR. COHEN: I ask that this evidence -- this

23 document be moved into evidence as Plaintiff's Exhibit 3.

24 MS. GROSS: Objection, your Honor.

25 THE COURT: On what grounds?

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CROSS - OFFICER SENA 36

1 MS. GROSS: It contains a statement in here that was

2 the subject your Honor's motion in limine.

3 THE COURT: May I see it, please?

4 MR. COHEN: Yes, your Honor. With respect to that

5 objection, the plaintiff has no objection to redact that

6 statement.

7 MS. GROSS: The defense counsel would renew that

8 redaction.

9 THE COURT: What do you want redact on this?

10 MR. COHEN: It's what they want to redact.

11 MS. GROSS: Yes, your Honor.

12 THE COURT: Let me see it redacted, please. All

13 right. Any objection to that redaction?

14 MR. COHEN: No, your Honor.

15 THE COURT: All right. It's in evidence.

16 (Plaintiff's Exhibit 3 was received into evidence.)

17 Q You've had an opportunity to review it, officer?

18 A Yeah.

19 Q Now, Officer Sena, this document has several different

20 boxes on it; is that correct?

21 A Yes.

22 Q And some of these boxes indicate what transpired on

23 May 15, 2008, at least from your end; is that correct?

24 A Right.

25 Q With respect to the box -- I'm going to approach the

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CROSS - OFFICER SENA 37		CROSS - OFFICER SENA 38	
1	witness. Can you -- where it says "time response requested"	1	A Again, I don't use the answering machine, so I don't
2	do you see that?	2	know.
3	A Yes.	3	Q But that specific box asks at what time was the response
4	Q What time was that?	4	requested; is that correct?
5	A It says 6 a.m.	5	A Right. Right.
6	Q Given that information, is that the time that the request	6	Q And it's at 6 a.m.?
7	from ECT to come and analyze this firearm was given?	7	A Yes, it does.
8	A Can I explain what this is?	8	Q Okay. You can keep the document. There is another box
9	Q Yes, please.	9	there, right?
10	A My partner, Julio Acevedo, Police Officer Acevedo, his	10	A Yes.
11	tour starts at 6. He's the only person in the ECT unit that	11	Q In the top right-hand corner regarding time arrived at
12	has a tour at start at 6 in the morning and ends at 14 --	12	scene; is that right?
13	well, 2:35. Our tour, everybody else's tour starts at 7. So	13	A Yes.
14	he comes in at 6, I guess checks the answering machine, I	14	Q That's what it says, right?
15	don't know how he got the information, I'm assuming of course	15	A Yes.
16	because I wasn't there, he received the information from the	16	Q And what's noted in that box?
17	answering machine when he walked into the office at 6 in the	17	A 0839.
18	morning. So according to him, he received the information at	18	Q And can you tell the members of the jury what that time
19	6 in the morning, because that's when his tour started, and	19	-- what that means, what time is that?
20	that's why it says requested at 6 in the morning.	20	A 8:39 in the morning.
21	Q Right. It doesn't -- but does your answering machine ask	21	Q And that's the time that you arrived at the scene?
22	the officers to leave a time once a request is made?	22	A In this case it's already -- these reports are already
23	A I do not know. I do not use the answering machine in the	23	filled out specifically with certain questions that we don't
24	office.	24	write down, it's just done that way. In this case, the scene,
25	Q Does the answering machine have a time stamp as to when	25	to us, is the scene where we have to go and swab or process

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CROSS - OFFICER SENA 39		CROSS - OFFICER SENA 40	
1	the firearm, so the scene will be the 77 annex for us.	1	A Right.
2	Q Right.	2	Q And you checked yes?
3	A Right.	3	A Yes.
4	Q But the form is filled out with these predetermined	4	Q Is that correct?
5	markers, "time arrived at the scene," because that's what ECT	5	A Yes.
6	is supposed to do is go to the scene, correct?	6	Q Did you collect the evidence?
7	A If feasible, yes.	7	A The evidence in this case is the DNA swabs.
8	Q And isn't it also a fact that there is no box here that	8	Q Okay. So you weren't referring to the firearm evidence?
9	says time arrived at the precinct?	9	A No.
10	A No, there is not.	10	Q So that's the evidence you are referring to?
11	Q There is one more box that I want to direct your	11	A Yes.
12	attention to, Officer Sena. The top, the middle of the top it	12	Q Thank you.
13	says -- also one of these prefab boxes where it says,	13	A Okay.
14	"evidence collected." Do you see that?	14	Q Now, Officer Sena, also included on this report is that
15	A I'm looking. Hold on.	15	you conferred with Officer Randall at the 7th precinct annex?
16	Q Toward the left?	16	A Right.
17	A Okay. Yes.	17	Q You conferred with him?
18	Q And also, that's prewritten on the form, correct?	18	A Yes.
19	A Yes.	19	Q You spoke to him about this case?
20	Q And there's two boxes where it says "evidence collected"	20	A Yeah. I'm sure I did. I don't remember. I saw it on
21	right?	21	the paperwork, so I'm sure I conferred with him.
22	A Yes.	22	Q Well, did he tell you that Burbidge collected this gun
23	Q And it says --	23	from the scene?
24	A Yes or no.	24	A Can I see the paperwork?
25	Q -- yes or no?	25	Q Yeah.

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CROSS - OFFICER SENA 41

1 A Sorry. To refresh my recollection. Thank you. It
2 doesn't state who collected the firearm.
3 Q Right. Would that have been important information,
4 Officer Sena?
5 A Would it be? Yes.
6 Q It would be important information, right?
7 A Yeah.
8 Q Because the collection process is important, correct?
9 A Yes.
10 Q Especially when you're trying to extract forensic
11 evidence from it, correct?
12 A Yes.
13 Q So did he also tell you that Burbridge took no steps
14 whatsoever to reserve the forensic evidence on the gun?
15 A Again, I don't recall having a conversation about the
16 collection of the firearm, so I don't know.
17 Q But you just mentioned a minute ago it would be important
18 information, right?
19 A Who collected it? Yes. I failed to write it in, in my
20 paperwork.
21 Q Who collected it, how it was collected, right, that's
22 important, right?
23 A Yeah.
24 Q Did he tell you that Officer Burbridge just picked it up
25 off the floor with his hand?

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CROSS - OFFICER SENA 42

1 MS. GROSS: Objection, your Honor, asked and
2 answered. The witness already told us he had no statements as
3 to what Officer Burbridge said.
4 THE COURT: You may answer if you can.
5 THE WITNESS: Yeah. Again, I have no recollection
6 of how it was collected.
7 Q And he didn't tell you that he used no gloves to pick the
8 gun off the floor? He didn't tell that you either, right?
9 A Again, I have no recollection of the collection of the
10 firearm at the scene.
11 Q Did you find unusual that this gun was collected from the
12 scene by the arresting officers and not by ECT, by the
13 evidence collection team?
14 A No.
15 Q You didn't find that unusual?
16 A No, I did not.
17 Q You thought that was perfectly fine, that's within the
18 NYPD protocols?
19 A It happens, yes.
20 Q It happens, but is it what's preferred?
21 A What's preferred is that it's left there, if it's
22 feasible, leave it there. Under the circumstances, I'm not on
23 the scene, so I don't know what's going on at the scene, what
24 time of day it is, if we're even available at that time to go
25 to the scene to collect it ourselves, because we have a lot of

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CROSS - OFFICER SENA 43

1 jobs that we're doing ourselves. Or, again, we don't have a
2 midnight shift, so if this happens roughly late or early in
3 the morning, we won't be available. So could it be left
4 there, you know, for hours and hours until we arrive. So
5 there is a lot of circumstances that take effect if, you know,
6 we could go out there and collect the evidence ourselves or
7 not.
8 Q But possession of a weapon is a very serious crime. I
9 mean, you'd agree, right, Officer Sena?
10 A I would agree.
11 Q That's a serious crime?
12 A Yes.
13 Q And it's one where it's important to get it right, isn't
14 that correct, Officer Sena?
15 MS. SANDS: Objection.
16 THE COURT: I'll allow it.
17 A Again, you know, if it's feasible, leave it on the scene.
18 It would be preferred to leave it on the scene.
19 Q There are several units working -
20 A I don't know that.
21 Q - in Brooklyn at nighttime, aren't there?
22 A I wouldn't know.
23 Q You were a patrol officer for 13 years, right?
24 MS. SANDS: Objection.
25 THE COURT: Sustained.

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CROSS - OFFICER SENA 44

1 Q You don't believe it was feasible to have officers guard
2 that gun to wait for evidence collection to come pick it up,
3 Officer Sena?
4 MS. SANDS: Objection.
5 THE COURT: Sustained.
6 Q During this conversing with Officer Randall, did he
7 happen to mention that there was another individual with
8 Joshua Marshall, who Joshua Marshall claims he threw the gun?
9 THE COURT: Sustained.
10 Q Now, you swabbed this gun in an attempt to obtain contact
11 DNA, correct, Officer Sena?
12 A Yes.
13 Q And you swabbed several areas on the gun, correct?
14 A Yes.
15 Q You swabbed the handle? You swabbed the barrel?
16 A Not the barrel.
17 Q You didn't swab the barrel?
18 A No.
19 Q You swabbed the trigger?
20 A Yes.
21 Q And you swabbed the -- you called them the ejector rods
22 on your report?
23 A I swabbed, I believe, the cylinder release and the
24 hammer, and I don't know if I swabbed the ejector rods or not.
25 I'd have to refresh my recollection by looking at my

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1 paperwork.

2 Q You prepared a property voucher in connection with this;

3 is that correct?

4 A Yes.

5 Q And if you saw the property voucher, would that refresh

6 your recollection as to what you swabbed?

7 A Yes.

8 MR. COHEN: Your Honor, should I have this marked

9 Plaintiff's 19 for identification?

10 THE COURT: Yes.

11 MS. GROSS: Could counsel provide a Bates number?

12 MS. SANDS: Your Honor.

13 THE COURT: All right.

14 MS. SANDS: Your Honor, we don't have a copy of it.

15 We don't have a copy of it.

16 MR. COHEN: You provided it to us.

17 MS. SANDS: But we don't have it in the exhibit

18 book.

19 THE COURT: All right. Excuse me. Proceed.

20 MR. COHEN: It's just for identification.

21 Q Do you recognize this document, Officer Sena?

22 A Yes.

23 Q Do you recognize it as -- what do you recognize this to

24 be?

25 A This is the property voucher vouchering the swabs of the

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1 firearm.

2 Q Okay. Can you just take a moment to review the property

3 voucher?

4 A Yeah.

5 Q Now that you've reviewed it, can you tell the members of

6 the jury what you swabbed, what part of the gun?

7 A Yes. I swabbed the back strap and the grips, which is

8 the handle area, the handle of the gun.

9 Q Can you actually stand up and point to where you swabbed,

10 please?

11 A Sure. This is the back strap grips of the gun, right

12 there. Trigger of the firearm right there. The cylinder

13 release of the firearm, which is right here that releases the

14 cylinder and the ejector rod, which is right here, where the

15 cylinder comes out. That, you push down, and it releases the

16 cartridges or fires, you know, shell casings right here, the

17 ejector rod.

18 Q Oh, that's the ejector rod?

19 A Yes, right here. This little stem right there.

20 Q You didn't swab the bullets in this case?

21 A No. Do you want this back?

22 Q Yes, please. Now, that gun is approximately 9 to

23 10-inches long?

24 A Approximately.

25 Q And how long would it take for sweat to build up or DNA

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1 material to build up on that gun?

2 MS. SANDS: Objection, your Honor.

3 THE COURT: If you feel you can answer it, answer

4 it; otherwise, do not.

5 THE WITNESS: I wouldn't know.

6 Q You have no idea?

7 A (Witness shakes his head no.)

8 Q You were instructed to, at some point in your career, to

9 take swabs of all guns; is that correct?

10 A Yes.

11 Q And in your training and experience, Officer Sena, if

12 multiple people handle the gun, would that effect the DNA

13 results?

14 A I'm sure it would. I really wouldn't know.

15 Q You are not --

16 A I just swab them. I don't test the guns. I don't test

17 for the DNA, I just collect the DNA.

18 Q But it's your understanding that when you test the DNA, is

19 any item that you test the DNA, you're supposed to be very

20 careful so that you don't get your DNA mixed in; is that

21 correct?

22 A Yes. It would be preferred if it's handled less

23 frequently.

24 Q Now, you see there's an initial on this gun, do you see

25 that?

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1 A Yes, circled.

2 Q It was circled, yes?

3 A Yes.

4 Q When you had -- when you were given this gun by Officer

5 Randall was that initial there?

6 A I don't recall.

7 Q It's possible that that initial was there?

8 MS. SANDS: Objection, your Honor.

9 THE COURT: Sustained.

10 Q And you also testified that when Officer Randall gave you

11 the gun -- oh, sorry. Withdrawn.

12 You testified that Officer Randall gave you the gun,

13 correct?

14 A Yes.

15 Q And was he wearing gloves when he gave you the gun?

16 A I don't remember.

17 Q And were the bullets inside the gun when he gave you the

18 gun?

19 A I don't remember.

20 Q He didn't tell you that Officer Burbridge took the

21 bullets out of the gun, did he?

22 A I don't recall.

23 Q Now, Officer Sena, you just testified that you did

24 fingerprint testing on the gun?

25 A Yes.

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CROSS - OFFICER SENA 49

1 Q And you do fingerprint testing on all guns that you are
2 called to process, as you called it?
3 A Yes.
4 Q And every single time that you ever fingerprint tested a
5 gun, you've never got a fingerprint result?
6 A No.
7 Q That's what you testified to?
8 A Yes.
9 Q That you continue to do the fingerprint test?
10 A Yes.
11 Q And then you also testified that you didn't bother to
12 fingerprint test the bullets; is that correct?
13 A That's correct.
14 Q Now, you would have to admit, Officer Sena, that in order
15 for the bullets to get inside the gun, someone has to touch
16 them, isn't that right?
17 MS. SANDS: Objection, your Honor.
18 THE COURT: I'll allow it.
19 THE WITNESS: Yes.
20 Q And if you found Joshua Marshall's prints on that gun,
21 that would suggest that he had handled the gun, isn't that
22 right, Officer Sena?
23 THE COURT: Don't answer.
24 Q But you didn't bother to take the fingerprints of the gun
25 -- of the bullets; is that correct?

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CROSS - OFFICER SENA 50

1 MS. SANDS: Objection, your Honor.
2 THE COURT: Sustained.
3 Q But you also testified on direct that in your experience
4 it is very unlikely to get fingerprints off bullets, right?
5 A Yes.
6 THE COURT: I don't think that was the exact
7 testimony.
8 MR. COHEN: He testified that it was very unlikely
9 to get fingerprints off bullets. Is that what you testified
10 to, Officer Sena?
11 THE COURT: I think he referred to the smallness
12 without drawing the conclusion.
13 THE WITNESS: Yes.
14 MR. COHEN: Okay.
15 Q But small objects like bullets, it's very difficult to
16 get fingerprint testing off of, correct?
17 A Correct.
18 Q How would you know that if you don't test the bullets?
19 THE COURT: Do not answer.
20 Q You testified that it's not your practice to test the
21 cartridges, isn't that right?
22 A Yes.
23 Q You also didn't swab the cartridges, isn't that right?
24 A That's right.
25 Q Officer Sena, the bottom line is on May 15, 2008 when you

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1 were called to process this firearm, you didn't find any
2 fingerprints of Joshua Marshall's on there; is that correct?
3 A I didn't find any fingerprints.
4 MR. COHEN: Thank you.
5 THE COURT: Any re-direct?
6 MS. GROSS: None, your Honor.
7 THE COURT: Thank you very much, sir. Next witness,
8 please.
9 NANA LAMOUSE-SMITH, called by Defendants, having been first
10 Duly sworn, was examined and testified as
11 follows:
12 LAW CLERK: Please being seated and state and spell
13 your name for the court reporter.
14 THE WITNESS: Nana Lamouse-Smith, N-A-N-A-
15 L-A-M-O-U-S-E-S-M-I-T-H.
16 DIRECT EXAMINATION
17 BY MS. CASTRO:
18 Q Good morning, Ms. Lamouse-Smith, how are you?
19 A Good morning. Fine. Thanks.
20 Q Are you currently employed?
21 A Yes.
22 Q By whom?
23 A I work at the Office of the Chief Medical Examiner in the
24 department of the forensic biology.
25 Q What is your position at the Office of the Chief Medical

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1 Examiner?
2 A I am a criminalist, level four.
3 Q What does criminalist level four mean?
4 A I'm a supervisor in a laboratory, so I supervise
5 criminalists one through three. In addition, I perform DNA
6 analysis, I review case files that have DNA tests, and in
7 addition, I write reports and testify as needed.
8 Q Are you appearing here in your capacity as an employee of
9 the Office of the Chief Medical Examiner?
10 A Yes.
11 Q And how many times have you appeared in court in that
12 capacity?
13 A Approximately 50 times.
14 Q In what types of cases?
15 A I have testified in criminal cases. So, for example, for
16 homicides, sexual assaults, property crimes, and weapons cases
17 in both grand jury and Supreme Court within all five boroughs
18 of New York City. In addition, I testified in federal court
19 and Baltimore City Criminal Court.
20 Q How long have you worked at the Office of the Chief
21 Medical Examiner?
22 A I've been there approximately seven and a half years.
23 Q And prior to work there where did you work?
24 A I began my career at the Bode Technology Group as a DNA
25 analyst for a year and a half before going to BRT Laboratories

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1 in Baltimore for another two and a half years as a forensic
2 examiner.

3 Q Can you tell us what your formal education is, please?

4 A I have a Bachelor's in biology from Vassar College, and a
5 Master's of Science in forensic science from the University of
6 Illinois at Chicago.

7 Q What training have you received to become a criminalist?

8 A I've received training at each laboratory in which I've
9 worked basically in their policies and procedures and the
10 techniques that they use within that laboratory. In addition,
11 I have taken the required coursework to be a DNA analyst,
12 which includes genetic biochemistry, molecular biology and
13 statistics.

14 Q Have you given lectures in your field?

15 A Yes, I have given lectures to the Assistant United States
16 Attorney's of both Eastern and Southern District of New York
17 regarding DNA testing at our laboratory.

18 I have also given a lecture on the same subject to
19 the Bronx County District Attorney's, as well as lectures at
20 my alma matter and St. John's College.

21 Q Are you a member of any professional associations?

22 A I'm an associate member of the American Academy of
23 Forensic Sciences.

24 Q Can you tell us is the Office of the Chief Medical
25 Examiner an accredited laboratory?

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1 A Yes.

2 Q So what does that mean?

3 A It means that we are following the guidelines regarding
4 DNA testing that have been set forth by the FBI. So we state
5 how we're going to follow those guidelines, and people from an
6 outside agency usually another laboratory will come in and
7 audit us to make sure that we are in fact following the
8 guidelines.

9 Q And how many cases a year do you handle?

10 A Me personally?

11 Q Yes.

12 A Well into the hundreds.

13 Q And how many cases do you supervise?

14 A Probably thousands.

15 Q Have you ever performed DNA analysis and testing in any
16 of these cases?

17 A Yes, in a few.

18 Q And what is DNA analysis?

19 A DNA analysis would be the culmination of the entire DNA
20 testing process where an analyst is interpreting the results.

21 Q And have you received any training in order to conduct
22 DNA analysis?

23 A Yes.

24 Q What training did you receive?

25 A I've received training that dates back to my Master's

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1 program in how DNA that analysis is performed, the specific
2 test. But then at each company that I worked at, I've been
3 trained in their procedures and protocols regarding DNA
4 analysis.

5 Q And approximately how many times have you performed DNA
6 analysis?

7 A Thousands of times.

8 Q Have you ever been accepted as an expert in the field of
9 DNA analysis?

10 A Yes.

11 Q How many times?

12 A Approximately 50 times.

13 Q And by what courts?

14 A In the grand juries and Supreme Courts in all of the
15 boroughs of New York City; in addition, federal court for the
16 Southern District and Baltimore City Criminal Court.

17 MS. CASTRO: Your Honor, at this time I'd like to
18 offer Ms. Lamouse-Smith as an expert in the field of DNA
19 analysis.

20 THE COURT: She may give her opinion.

21 Q I want to direct your attention to May of 2008. Did your
22 office receive a request from the NYPD to conduct DNA analysis
23 of a 38 caliber Smith and Wesson firearm?

24 A Yes.

25 Q And did you conduct that examination?

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1 A I personally did not conduct the examination on the
2 evidence.

3 Q Who did?

4 A The examination was conducted by a person I supervised at
5 the time named Joe Ross.

6 Q And what did Mr. Ross' examination consist of?

7 A He took the items out of evidence storage, signed the
8 items into his possession and began examining the items, which
9 in this case were swabs.

10 So that entailed taking notes on the packaging in
11 which the swabs were received, taking notes on the swabs
12 themselves, their appearance, and then taking a sampling from
13 the swabs for DNA testing.

14 Q And what were the findings of that examination?

15 A There was an insufficient amount of DNA.

16 Q Does that mean that -- well, what does that mean,
17 insufficient amount?

18 A It means there was not enough DNA for us to go forward
19 with our standard DNA testing.

20 Q Were there any other types of tests that could have been
21 performed?

22 A In our laboratory we also perform what's called high
23 sensitivity DNA testing. And this type of testing is
24 performed on samples which have less than our standard amount
25 of DNA or the sort of normal testing. It's a more rigorous

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1 testing. It involves a little more time and energy, so it's
2 usually reserved for cases like homicides or very serious
3 assaults.
4 Q Were these findings written down in a report?
5 A Yes.
6 Q What was the date of that report?
7 THE WITNESS: Your Honor, may I refer to my file?
8 THE COURT: You may.
9 A The report date was June 10, 2008.
10 Q And who wrote that report?
11 A I signed the report.
12 Q Did you review the report prior to signing?
13 A Yes.
14 Q Prior to review of this particular case had you ever
15 encountered a case where there was insufficient DNA?
16 A Yes.
17 Q Is that something that has occurred typically in your
18 experience?
19 A It has occurred. I don't know if I would say "typically"
20 but it's not a surprise if a case is insufficient, it does
21 sometimes happen.
22 Q What are some factors that could contribute to that
23 happening?
24 A It could be that no DNA was deposited on the item. It
25 could be the DNA that was deposited on the item has since been

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1 degraded or destroyed due to environmental factors, such as
2 extreme heat or cold or dampness.
3 Q Ms. Lamouse-Smith, if someone was observed pulling a gun
4 from their waistband of his pants, would you expect to find
5 DNA on that item?
6 A It's possible. In my opinion it's -- sort of the way I
7 imagine it, it would be similar to wiping an item off. It's
8 the -- what has been deposited on the one item, the weapon is
9 now being rubbed against something else, so matter is being
10 exchanged between the two items, so it's possible that the DNA
11 was that originally deposited on the weapon is no longer
12 there.
13 MS. CASTRO: Thank you. I have nothing further at
14 this time.
15 THE COURT: Cross.
16 CROSS-EXAMINATION
17 BY MR. COHEN:
18 Q Good morning, Ms. Lamouse-Smith.
19 A Good morning.
20 Q This is the first time you've been called to testify on
21 this particular case; is that correct?
22 A Yes, that's correct.
23 Q You didn't testify in the grand jury in this matter?
24 A No, I did not.
25 Q You didn't testify at all throughout the criminal case

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1 that's the underlying reason for this matter?
2 A No, I did not.
3 Q And you were not called for a deposition in the cause of
4 action that we are here for today; is that correct?
5 A No, I was not.
6 Q In fact, you were not called for -- your attention wasn't
7 drawn to this case until last week, isn't that right?
8 A It was either last week or the week before, I think.
9 Q Okay. So within the last month?
10 A Yes.
11 Q The last four years you have not even thought about this
12 case; is that correct?
13 A Correct.
14 Q In fact, you actually didn't do the testing on this case,
15 you were simply the supervisor, right?
16 A I was the supervisor, but I also did sign the report.
17 Q But you were familiar at the time that the testing was
18 going on with respect to this matter, right?
19 A We do testing on thousands of cases in the laboratory, so
20 specifically this case, I mean, I can't say that I was aware
21 of that.
22 Q Okay.
23 A It's just one of many.
24 Q Now, in connection with being called by defense counsel
25 today, you also submitted a report, isn't that correct?

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1 A Correct.
2 Q And in that -- you submitted that report actually this
3 week?
4 A Yes.
5 Q And it was prepared this week?
6 A Yes.
7 Q In advance of this trial?
8 A Yes.
9 Q Do you have a copy of that report in front of you?
10 A I did bring a copy with me.
11 Q Now, one of the things you alleged in this report is that
12 often times DNA is not found on firearms; is that correct?
13 A Can you tell me what page are you looking at?
14 Q Yeah. If you look at the second page, I'm not quoting
15 exactly from the report.
16 A Okay.
17 Q But the second page, the third to last paragraph.
18 A Yes.
19 Q So it's your testimony that it's often the case that
20 insufficient amounts of DNA are yielded from firearms,
21 correct?
22 A Yes. In my experience a large number of the weapons
23 cases submitted to the laboratory have been insufficient for
24 further DNA testing.
25 Q For all further DNA testing?

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1 A No.

2 Q Your office actually in recent years starting in 2008

3 started -- well, 2006 actually, started doing high sensitive

4 DNA testing, correct?

5 A Correct.

6 Q And you testified to that in direct examination?

7 A Yes.

8 Q And this advance of technology that's been around that

9 predates this case could find DNA on firearms, isn't that

10 right?

11 A If enough DNA was present, potentially a DNA profile

12 could be yielded.

13 Q Right. And in fact, your office maintains a website that

14 boasts about the great innovations of science and specifically

15 states that items that used to be difficult to get DNA now can

16 have DNA on them, isn't that correct?

17 A I am not entirely familiar with what our website says.

18 THE COURT: That's enough. Excuse me. That's

19 enough. Ask your next question.

20 MR. COHEN: Yeah.

21 Q I'm sorry, I didn't mean to interrupt you.

22 A That was it. Go ahead.

23 THE COURT: That's enough of an answer. Ask your

24 next question.

25 MR. COHEN: Yes.

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1 Q I'm now showing you what I'd like to have as Plaintiff's

2 Exhibit 20 for identification.

3 THE COURT: Is that the website?

4 MR. COHEN: Yes.

5 THE COURT: I don't want any questions about it.

6 MR. COHEN: You don't want any questions about it?

7 THE COURT: That is correct. You are marking it as

8 what for identification?

9 MR. COHEN: For identification.

10 THE COURT: What?

11 MR. COHEN: It's 20, Plaintiff's Exhibit 20 for

12 identification. May I ask the witness if she recognizes this

13 website?

14 THE COURT: She already said she doesn't know what's

15 on the website.

16 MR. COHEN: She said she's familiar with it.

17 THE COURT: Do you know what's on the website? Did

18 you prepare the website.

19 THE WITNESS: No, I did not. I know that --

20 THE COURT: Did you approve the website?

21 THE WITNESS: No.

22 THE COURT: Don't ask anything about the website.

23 Q So when you were called by defense counsel in this matter

24 you reviewed a file that you had -- your office had in this

25 case; is that correct?

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1 A Yes.

2 Q And you reviewed it just as recently as about one to

3 two weeks ago; is that correct?

4 A Yes.

5 Q And in reviewing the information did it refresh your

6 recollection as to what was found with respect to the DNA

7 testing?

8 A In terms of the results?

9 Q Yes.

10 A Yes.

11 Q You testified on direct there were insufficient results,

12 isn't that right?

13 A Yes, there was an insufficient amount of DNA.

14 Q An insufficient amount of DNA for the regular testing; is

15 that right?

16 A Correct.

17 Q But there was a sufficient amount of DNA for the high

18 sensitivity testing, isn't that right?

19 A Correct. One of the samples would have had enough for

20 high sensitivity testing.

21 Q And, in fact, your office still maintains the extract for

22 that sample as of today, right?

23 A Correct.

24 Q So in the last four years you haven't been called by the

25 prosecutors, you haven't been called by the defense counsels

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1 in this case, you haven't been called by anybody to test that

2 extract, correct?

3 A Not to my knowledge, no.

4 Q The mystery of this case could be completely wiped away

5 if you tested that DNA sample, isn't that right?

6 MS. CASTRO: Objection.

7 THE COURT: Don't answer.

8 Q You could get a profile if you tested that DNA sample?

9 THE COURT: Don't answer.

10 MR. COHEN: The DNA sample of the profile.

11 THE COURT: Have you tested it?

12 THE WITNESS: No, we have not tested it.

13 Q My question is if you did test it, you could potentially

14 get a DNA profile, isn't that correct?

15 A It's possible.

16 Q Isn't it also possible that other items -- let me

17 withdraw that. What were the items that your office received

18 that were swabbed?

19 A The items we received were listed as being a swab of back

20 strap and grips, a swab of trigger, a swab of cylinder and a

21 swab of ejector rod.

22 Q Correct. And there's no mention of the cartridges being

23 swabbed; is that correct?

24 A No, I do not see that in the file.

25 Q Now, if you were to know that there were cartridges

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